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A TREATISE ON AMERICAN BUSINESS LAW

With Illustrative Cases

In Six Volumes

BY FRANK HALL CHILDS, LL.B.

OF THE CHICAGO BAR

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"A knowledge of law should be the possession of the many and not of the few."

CHIEF JUSTICE WINSLOW.

AGENCY.

WALTON SERIES.

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CHAPTER I.

DEFINITION, CLASSIFICATION, AND ELEMENTS.

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7. Classes of Agents.
8. Delegation of Authority.
9. Sub-agents.

AGENCY DEFINED.

1. Agency is a contractual relation existing between two parties, in which one of them, known as the Agent, has authority to act on behalf of the other, known as the Principal, in business transactions with third persons.

When a person expressly or impliedly authorizes another to act in his behalf in business transactions, the acts of the person so authorized are considered by the law as the acts of the person giving the authority. The person authorizing is the principal, the person authorized is the agent, and the relationship existing between them is called agency.

In modern times, of necessity, a large volume of all business is transacted either wholly or in part through the medium of agents. Business organizations of today, whether incorporated or whether the proprietors are partners or individuals, transact so vast a volume of business, over such a wide territory and through so many channels, that numerous

instrumentalities, or agencies, are frequently required to complete the transactions. A railroad corporation, for example, aside from its army of servants, must have its directing officers, its managers and division superintendents, its fiscal, purchasing, freight, passenger and station agents who assist in the conduct of its business and bind it by their acts done in its behalf. Banks must have officials to act as the bank's agents in making its loans and investments as well as agents in other cities to collect. Every business of any considerable size must have its sales agents, just as the small storekeeper, on a lesser scale, has his agents to sell his merchandise. A farmer sends his produce to a commission merchant, a factor, who acts as his selling agent. The owner of a building employs a real estate agent to manage it for him, to make leases and to collect rents. One who is a party to a law suit retains an attorney to represent him in the litigation. These are but a few of the countless examples of agencies.

Thus it will be seen that the question as to whether the relation of principal and agent exists is one of the ordinary and frequent questions arising in the business world and it is therefore important that one be able to determine when and how the relation is created and what are the consequences of its creation.

AGENCY IS CONTRACT RELATION.

2. Agency is normally a contract relation and is governed by the general principles of contract law.

Agency being a contract relation the parties to the contract of agency must be legally competent parties. If incompetent parties enter into an agreement to create an agency it will be either void or voidable. A principal must always be legally competent, but a third person may be bound by contract created by a legally incompetent agent, for

the reason that the other party to the contract, the principal, is a competent party. This phase of the subject is discussed in the next chapter.

There must be an agreement between the principal and the agent to validate the contract. This agreement may be express or it may be implied from the relations of the parties, or from their conduct. This question is treated in the subsequent chapters.

There must be a consideration to support this contract as in the case of any binding contract. This consideration may be an agreed sum, it may be a stipulated percentage or commission, it may be an exchange of services, or it may be a sum governed by the usage of a particular line of business, but in every case it must be something of value. It may even be contingent but must ultimately mean something of value which would be sufficient to support a legally binding contract. Where the consideration is a contingent fee either party may fail to perform without incurring liability; but if there is performance, the contingent fee to be paid is a valid consideration and would fix the measure of damages if the principal refused to pay. The consideration may be implied; as where one person permits an agent to act in his behalf under such circumstances that any reasonable person would be presumed to know that such agent expected remuneration for his services. In such case the agent would be entitled to reasonable compensation based on the value of his services.

The agency must not be created to further any illegal object or it will lack an element essential to its validity. The performance of an act which a person cannot legally perform cannot be delegated to another; hence an agent cannot be appointed to do illegal, immoral or criminal acts.

Thus, in a state where the sale of liquor is prohibited by law one cannot appoint an agent to sell liquor for him in that state. An appointment of an agent as a lobbyist to secure the

passage of a bill pending before a legislative body is contrary to public policy, as is also the appointment of an agent to act as a marriage-broker or to sell lottery-tickets.

It is the practice of the courts to leave parties to illegal agreements where it finds them; therefore where the object of an agency is illegal the agent cannot be held liable by his principal for a breach of contract, nor can the agent recover from his principal for services which the agent has rendered under the agreement.

MAXIMS OF THE LAW OF AGENCY.

3. The act of an agent in behalf of his principal is, in law, the act of the principal himself, the rights and liabilities of the principal being the same as if he were personally present and performed the act.

Two old maxims of the law—*"Qui facit per alium facit per se"*—Latin—He who does a thing through another, does it himself—and—*"Respondeat superior"*—Latin—Let the superior, or principal, answer—are governing and fundamental principles of the law of agency. The first of these maxims means that when a person's duly authorized agent acts in his behalf, the act of the agent is, in law, the act of the principal. In other words, it is considered the act of the principal, so far as his legal obligation is concerned, just as if he had been personally present and had performed the act himself. The latter maxim expresses the consequences of the former and means that in law the principal is held to answer for the acts of his agent performed while such agent was acting within the scope of his authority.

TEST TO DETERMINE EXISTENCE OF RELATION.

4. When one person acts in another's behalf and creates a contractual relationship between his superior and a

third person, the relation of principal and agent is established. The fact of the creation of a contractual relationship is the dependable test.

Unless the person assuming to act as agent creates a contractual relationship on behalf of his superior no agency exists. For example, a storekeeper hires a clerk to sell goods in his store. When the clerk makes a sale he creates the contractual relationship of seller and buyer between his employer and the purchaser. Hence the clerk is an agent. Or if an insurance solicitor secures an application for insurance and later a policy is written by the solicitor's company on the life of the applicant, the solicitor is an agent because he created the contractual relationship of insurer and insured between his company and the applicant.

Disputes have frequently arisen in numerous situations as to whether a person is an agent or whether he acts in some other capacity and it is therefore highly essential that there be some dependable test to determine when an agency exists.

Thus, where a farmer gives his adult son the use of certain land, the son to return a certain share of the crops to the father, the relationship existing between them is that of landlord and tenant, as a lease is here entered into, the share of crops being the rental paid for the use of the land. The son is not the father's agent, as he has no authority to pledge the father's credit for supplies or otherwise to contract in his name.

Frequently a question arises as to whether a trustee is the agent of his beneficiary. There are several distinctions to be noted in the two relations. In an agency the principal has the title to the property involved and the agent acts in the principal's name; in a trust the trustee is vested with the legal title and acts in his own name. An agency may generally be revoked at any time; while a trust is ended only by carrying out the terms of the trust. And, to apply the governing test, an agent is empowered to bind his principal contractually with third persons; while a trustee cannot make either the beneficiary or the creator of the trust liable to third persons.

Where a person acts in another's presence and in obedience to his orders, the act done is the act of the person in control and there is no delegation of authority; as where an invalid directs a person to sign a document for him in his presence and in the manner directed. The person so signing the other's name is not his agent but is the mere mechanical instrument of the person giving the order.

A pertinent question to be asked in all questions of dispute as to whether an agency exists is, "Who receives the benefit of the transaction?" Manifestly when an agent creates a contract on behalf of his principal the principal is to receive the benefit. If the contract created does not purport to enure to the benefit of the creator's superior, the creator is not an agent. If one employs workmen or receives goods for his own benefit he is a principal; if he employs workmen or receives goods for the advantage of another he is an agent. In deciding questions of this character the courts will give effect to the intention of the parties regardless of what they call themselves. Their intention may be inferred from their agreements or from their acts.

DISTINCTION BETWEEN AGENT AND SERVANT.

5. A servant is one who acts for another, called the master, in the manner ordered by the master and under the master's direction and control.

A servant does not create contractual relationships in his master's behalf and this distinction takes him out of the class of agents. He merely carries out his master's orders in the manner in which the master directs; as where a storekeeper employs a driver to deliver goods which have been sold. If such delivery is the driver's sole duty he is a servant. An employee may possess a high degree of personal skill and receive a large compensation for his services and yet be a

servant, as, for example, hospital physicians, engineers and horse trainers. These servants, as will be seen, may render their masters liable for any acts of negligence on their part but they are servants nevertheless for they do not bind their superiors contractually.

The element of discretion sometimes enters to aid in determining whether one is an agent or a servant; for a servant possesses little or no discretionary power, while the agent may possess much. Discretion here is used in the sense of acting on one's judgment in dealing contractually with third persons in the principal's behalf. The hospital physician, the engineer and the horse trainer may exercise a high degree of skill and discretion in discharging their duties but still it would be merely personal discretion in the manner of completing their tasks. They are, as other servants are, merely extra pairs of hands for their masters, so to speak.

Much confusion has arisen in the law because of the interchangeable use of the words "agent" and "servant." The words are often used erroneously, in a legal sense, in statutes and in contracts. As a matter of fact the distinction frequently turns on the question of evidence. Generally the servant deals with things or with persons in a non-contract capacity, while the agent deals with persons and creates contracts. If a master authorizes his servant to step aside from his tasks and act for him in a certain transaction as his agent, the servant is an agent to the extent that he acts as one.

Thus, a farmer orders a farm hand to leave the field where he is working and sends him to a nearby town to purchase supplies. When the farm hand makes the purchase he is an agent so far as that act is concerned.

Where an employee is sent by his employer to buy goods of which the employer is in need, the employee to use his judgment and discretion as to the quantity, quality and price of the

goods, the employee is an agent—an agent to purchase. If an employee is sent by his employer to bring an article which has been purchased, the employee is a servant—merely a messenger. If the same person should perform both of these acts on the same trip he would be an agent when he performed the first and a servant when he performed the second.

So far as liability for negligent acts is concerned the relation of principal and agent and that of master and servant are practically the same inasmuch as the principal is liable for the torts of his agent and the master is responsible for the torts of his servant. The principle embodied in the maxim "*Respondeat superior*"—Latin—Let the principal or master answer—is applicable in both cases.

Thus, a motorman on a street car is a servant. If he injures a person by reason of his negligent operation of the car he is operating, the company is liable in damages.

Thus, the conductor on a street car is an agent of the railway company. If he should wrongfully demand and collect an excessive fare, the company would be liable in damages.

DISTINCTION BETWEEN AGENT AND INDEPENDENT CONTRACTOR.

6. An independent contractor is one who agrees with another to accomplish a certain result for a stipulated consideration, the independent contractor to use his own means and methods in accomplishing the result.

The independent contractor, acting in an independent capacity, contracts to do certain work, using his own methods, and free from the control of the person employing him except as to the result of his work. The independent contractor differs from the agent in that he is not, like the agent, subject to the control of the person for whom he is working. The independent contractor has not the authority, as has the agent, to bind the other party to the contract with

reference to dealings with others. His rights and liabilities are fixed in his contract and he is personally responsible to third persons by reason of any negligence on his part.

Thus, *A*, the owner of a building, employs *B*, a heating contractor, to install a heating plant in *A*'s building at a certain price, *B* to have control of the work, put his employees to work on it and do the work in his own way. *B* is an independent contractor. He is responsible to *A* only for the result of the work. If he should injure someone while doing the work he alone would be liable in damages for the injury; *A* would not incur any liability.

There are some exceptions to this general rule that the employer of an independent contractor is not liable for the acts of the independent contractor. The employer is liable in the following cases:

First, where the employer retains some control over the work to be accomplished; as where an independent contractor has been employed by a railroad company to construct a railroad, but the railroad company has a right to appoint and to discharge the engineer of the construction-train. In that case the railroad company would be liable for the negligent acts of the engineer.

Second, where the result to be accomplished by the employment itself causes injury; as where an independent contractor is employed by a railway company to build a bridge over a navigable stream, and the bridge as ordered built by the railway company obstructs navigation. The railway company will be liable for the obstruction.

Third, where the object to be accomplished by the employment of an independent contractor is necessarily dangerous; as where an independent contractor is employed to make an excavation in a street. The employer will be liable for any damage caused to third persons by the excavation.

Fourth, where the duty is imposed by contract. Thus, where a company operating an amusement-park employs an independent contractor to build a grand-stand, and the grand-stand falls as a result of defective construction, injuring patrons of the park, the company will be liable to injured parties.

Fifth, where the duty is imposed by law. Thus, where a city ordinance requires a lot-owner to place a light on piles of material left in the street in front of the lot, the lot-owner is liable for any injury to third persons resulting from lack of light, though the material was placed on the street by an independent contractor employed by the lot-owner.

CLASSES OF AGENTS.

7. **A general agent is one having authority to transact—generally the business of his principal.**

A special agent is one who has authority to do a special or particular act in behalf of his principal.

An agent del credere is one who, for an additional compensation, guarantees the payment of the debts of those with whom he deals on behalf of his principal.

Agents are subject to several classifications, one of which is into general and special. A "General Agent" is one who is employed to do acts of a class; as where he is empowered to buy wheat for his principal in St. Louis County, Missouri, or where he is employed to manage his principal's business. A general agent has a large apparent authority. Thus, where an agent is employed to manage his principal's business he has the broad authority necessary to carry out his agency—to buy and to sell, to employ and to discharge, to give credit and to pay debts. The fact that an agent's authority is limited in certain particulars does not necessarily take him out of the class of general agents. The subjects of

apparent authority and the extent of authority of general and special agents and the various kinds of agents are considered in the subsequent chapters.

A "Special Agent" is one employed to do particular acts; as where he is employed to purchase a car-load of wheat in Cook County, Illinois, to sell a house, to sell a shipment of goods, or to conduct an auction-sale. He has but little apparent authority, just enough ordinarily to do the specific thing he was engaged to do. Where an agent has special authority he cannot execute general authority. An agent having special authority must strictly pursue the terms of that authority. An agent employed to sell realty on certain terms must sell on those terms and on no other. (See Appendix B, Case No. 76.)

It will be noticed that the terms "general" and "special" agents do not have the same meaning in law as in popular language. Thus, an insurance company would designate a man employed to look after losses alone a special agent as that is his special work, but in law he would be a general agent as he is employed to perform all of the acts which come within his authority. Likewise a girl in a department store who sells thread and nothing but thread would be, in law, a general agent although her duties are confined to the one commodity.

The *del credere* agent, for an additional compensation, agrees with his principal that all the money to become due to the principal through his agency shall be promptly paid, if not by the debtor, then by himself. He insures the punctuality and solvency of those to whom he extends credit. *Del credere* is from the Italian, meaning "of trust." Being an insurer and not a surety, an oral contract between him and his principal is enforceable.

DELEGATION OF AUTHORITY.

8. As a general rule, an agent cannot delegate his authority.

The general rule as to the delegation of authority by an agent is embodied in the maxim—*"Delegatus non potest delegare"*—Latin—A delegated authority cannot be delegated. The principal is entitled to the judgment, experience and personal service of his agent; therefore the agent must retain in himself the doing of those acts which involve the exercise of discretion and judgment. Though the agent may in some cases appoint sub-agents to assist him in the details of his agency, he must himself discharge that part of the work calling for the exercise of the skill and business ability which his principal relied upon when he employed him. His duties are personal and not assignable.

Thus, where the officers of a corporation are elected by the stockholders they become the agents of the corporation. The stockholders elect them that they may receive the benefit of their experience, ability and integrity, and therefore their discretionary duties may not be delegated to others.

When an agent is employed because he represents that he possesses skill in a certain capacity or is employed because he possesses professional skill he may not delegate to another the doing of acts requiring the exercise of that skill. The fact that the owner of property gave authority to an agent to sell the property and use his discretion as to price does not give the agent authority to employ a broker to make the sale, where there is no proof showing that the agent could not have made the sale himself or to show any established custom in the locality where the agency was to be exercised for the employment of brokers. (See Appendix B, Case No. 77.)

SUB-AGENTS.

9. An agent may, when the circumstances of the agency warrant it, appoint sub-agents to assist him in performing the duties of the agency. When such sub-agents are properly appointed their acts are binding upon the principal.

In many instances the agent is charged with the handling of extensive transactions and it is absolutely necessary from the very nature of his duties that he have assistance in their discharge. For example a general sales agent in a certain territory, doing a large volume of business, may hire sub-agents to solicit orders for the principal, the agent retaining in himself the power to extend or to refuse credit, to collect accounts, to advertise, and to purchase supplies. The agent is acting within the scope of his authority so long as the sub-agents are not permitted to do other than assist him in the details of his agency. Although the authority of the agent to appoint sub-agents may be fairly inferred from the nature of the agency, yet such appointments should properly be made after notice to the principal and with his consent.

When sub-agents are properly appointed the principal is bound to third persons by their acts, and the agent is liable to the principal for any wrongful acts of his appointees. If the principal should hire the sub-agents and put them under the direction of the agent, the agent is not responsible for their acts unless he connives with them in doing wrongful acts.

CHAPTER II.

COMPETENCY OF PARTIES.

10. Competency to be Principal.
11. Natural Incompetency.
12. Legal Incompetency.
13. Implied Power of Appointment.
14. Competency to be Agent.

COMPETENCY TO BE PRINCIPAL.

10. Any person not naturally or legally incompetent to act in his own behalf may be a principal.

Generally one may delegate to another the execution of any act which he may legally do himself. Of course he may not delegate purely personal acts, such as voting at public elections, taking an oath of office, swearing to an affidavit, making a will, or making an assignment for the benefit of creditors, but in the transaction of the ordinary affairs of business life he may employ another to act in his stead. It is an absolute essential that the principal be fully competent to contract in order to appoint an agent, for the reason that an agent's sole duty is to create contracts for his principal, and if the principal were incompetent the contracts would lack an element essential to their validity, being either voidable contracts or void agreements. The agent's competency is relatively unimportant so far as third persons are concerned, as the agent is not the other party to the contract; but the principal's competency to contract is indispensable to the formation of a binding and enforceable contract.

NATURAL INCOMPETENCY.

11. Persons lacking natural competency to contract cannot make a valid appointment of an agent.

One who does not possess natural competency lacks competency in law to be a principal; he lacks the legal power to appoint agents. A person is naturally incompetent because he is mentally defective, as in case of lunatics, idiots and drunkards. The general rule is that appointments of agent by those legally incompetent are void. This is universally true with regard to an insane person's appointment of an agent by power of attorney. The courts of some states hold that appointments of agents by those lacking natural capacity are voidable and not void.

Thus, if an insane person, having a lucid interval, appoints an agent, and the agent contracts with a third person who deals honestly with the agent on the assumption that his principal is competent to contract, the court may hold the agency valid if the third person would suffer a loss by holding otherwise. If the third person could be placed in his original position the court might insist that this be done, and then hold the appointment of the agent to be void. Courts in some states hold that the appointment of an agent by an insane person or idiot is voidable at the option of the insane person, in which case the person dealing with the agent would be at the mercy of the insane person or idiot.

Practically the same rules govern with regard to an habitual drunkard's appointment of an agent. Courts in some states hold that the appointment of an agent by an habitual drunkard when sober is valid, while other courts hold that a drunkard's contracts are voidable at his option. The fact that an habitual drunkard was sober when he made the appointment or that an insane person had a lucid interval at the time of appointment is a fact which the court would require to be established clearly by legally competent

evidence. Inasmuch as strict proof of this fact may be extremely difficult or well nigh impossible to be made, it will be seen that it is risky in the extreme to deal with agents of those who do not possess full power to contract.

LEGAL INCOMPETENCY.

12. Persons lacking legal capacity to contract cannot make a valid appointment of an agent.

Persons who are legally incompetent to contract are likewise incompetent to appoint agents. Those falling within this classification are minors, and residents of a country at war with this nation. In some jurisdictions the courts hold the appointment of an agent by a minor to be absolutely void. In other jurisdictions it is held to be voidable at the option of the minor. The minor's appointment of an agent by a power of attorney is absolutely void. Where the minor's appointment of an agent is void he can never ratify the agent's acts, as the transaction was void from the beginning.

Thus, a minor appoints an agent by a contract under seal to execute a conveyance of the minor's land. The appointment being void from the beginning, the minor cannot ratify the agent's act although he could ratify his own conveyance of the property after he became of age, though his original act was voidable.

When a minor's appointment of an agent is held to be voidable he may hold the third person with whom the agent dealt and demand the enforcement of the contract. If he chooses to disaffirm the appointment the other party may not hold him for its breach. When the minor's agent deals with a third person who acts in good faith and without knowledge of the principal's incompetency the court will

see, if it is possible, that such third person be restored to his original position. If this cannot be done the third person will be the loser so far as the minor is concerned but he will have a right of action against the agent if the agent was guilty of a breach of his implied warranty of his principal's capacity.

An alien, when the country of his nativity is at peace with this nation, may be a principal. If a person is a resident of a country at war with this nation his capacity to act as principal would be suspended during hostilities.

At common law a married woman was not competent to contract and hence could not appoint agents. Such disability is now merely a matter of history as the states have passed statutes which give women practically the same legal rights as men, so far as entering into contracts is concerned.

IMPLIED POWER OF APPOINTMENT.

13. A corporation has implied power to appoint agents.

Each member of a partnership is impliedly a principal whose agents are his co-partners; and each member of a partnership is impliedly an agent for all of his co-partners.

A member of an unincorporated society is not bound by the acts of another member unless the latter is authorized so to act.

A corporation, as it is an artificial person created by law, can act only through agents. It therefore has implied power to appoint agents to do any acts which the corporation is authorized by its charter to do. A president of a corporation is its agent as is any other person in its employ who causes the formation of contracts between the corporation and third persons.

A corporation can legally do only such things as its charter gives it the power to do, therefore if a corporation should appoint an agent to do some act beyond its charter power [called in the law an *ultra vires* (Latin—beyond their powers—) act] and the agent should make a contract with a third person to carry out the contemplated act, the third person could not hold the corporation to its contract unless the contract had been partially performed and such third person had suffered a loss by acting under such contract. If the contract was wholly executory it could not be enforced.

If a question should arise in a certain transaction as to the power of a corporation to act as either principal or agent, the charter should be consulted to settle the question. A corporation has the implied power to appoint agents to do those things which the corporation has a right to do in order to carry out its express powers. A full discussion of the capacity of a corporation to contract, through agents or otherwise, will be found in Volume V of this series.

Partners being co-owners of the partnership business, their relation to one another implies that each is the agent of the other and each is likewise a principal. A partner binds himself and his co-partners by his acts done within the scope of his actual or of his apparent authority. A full discussion of the rights and liabilities of partners will be found in the work on Partnership in this volume.

Unincorporated clubs and societies must usually act through agents, though such organizations have not implied power to appoint agents. Such agents are generally appointed by a formal act, the vote of the society. Generally the authority to bind the society on contracts or for purchases is vested in a committee by a proper vote. If the members of such a committee should exceed their authority

they may be held personally responsible for the exercise of such excess authority. To ascertain the extent of the agent's authority in cases of this kind, a reference to the records of the organization should disclose the facts. Of course a club or society of this type may be held after they have formally adopted an act done in their behalf by an officer or member; but a third person is not safe in acting on the assumption that this will be done, for it might develop that neither the society nor the member acting as agent is financially able to pay the debt.

Thus, a political club at one of its meetings passed resolutions endorsing the candidacy of a candidate for office and expressing a desire to do all in the power of the club to aid in his election. After the meeting, two of the club's officers ordered a large number of cards printed to further the campaign of the candidate in question and directed the printer to send his bill to the club. This the printer did and the club refused to order the payment of the bill. The printer then sued the officers as individuals. They claimed that they were merely acting as the club's agents in giving the order, but the court held that they acted without authority and were personally liable. If the judgment against the officers should be uncollectible the printer would have to bear the loss.

A member of an unincorporated society, even though voting against the appointment of an agent, might be held liable on the theory that he approved of the act of the majority. It is safest for a member who does not want to be held liable for the acts of another person to be performed on behalf of the society, to object to the action taken at the meeting and to insist that his objection appear upon the minutes of the meeting.

In view of the fact that unincorporated societies frequently are formed for temporary purposes and the membership is uncertain, third persons dealing with an agent of such a society usually rely upon him personally, hence the agent should make it clear that he is not to be held personally responsible for all of the liability.

COMPETENCY TO BE AGENT.

14. To be an agent one need possess only such intelligence as is necessary for the performance of the act required of him by the principal.

A corporation may act as agent within the scope of its charter powers.

A partnership may act as agent if authorized.

An alien may act as agent subject to his statutory disability in event of war.

While one must possess both natural and legal capacity to act as principal, to be an agent it is necessary only that he have sufficient intelligence to do what the principal requires, to cause the formation of a contract on the principal's behalf.

Thus, a father sends his five-year-old child to a grocery store to purchase groceries and to charge them to the father. The child is the father's agent. The contract of sale created by the child is valid in every particular and binding upon the parties thereto.

The same principle applies with reference to persons lacking natural capacity. So long as the principal is competent to contract, the agent's lack of competency does not affect the validity of the contract. Neither the principal nor the third person can take advantage of the agent's incompetency to escape liability on the contract. The incompetent person's privilege under the law to avoid his contracts is personal with him. He may disaffirm his contract of agency if he choose, and cannot be held for the breach. He may hold the principal to the contract if he choose, and recover what he has earned in the employment.

A corporation can act as agent if it does not exceed its charter powers. A partnership can be appointed an agent,

in which case the firm, as agent, is responsible for the acts of each partner in carrying out the agency.

An alien may act as agent except when a statute declares him ineligible in event of war.

CHAPTER III.

APPOINTMENT.

15. Necessity of Appointment.
16. Express Appointment.
17. Statutory Requirements—Statute of Frauds.
18. Implied Appointment.
19. Husband and Wife.
20. Parent and Child.
21. Agency by Estoppel.

NECESSITY OF APPOINTMENT.

15. The agent's authority is derived only from appointment by his principal.

The appointment of an agent may be express or implied.

An agent is an agent only by the will of his principal, hence it is essential that the agent be appointed in some manner by his principal. As a person cannot be made a principal against his will, it is necessary that his intent to appoint an agent be shown either by express authority given to the agent or by acts done from which the existence of the relation may be implied.

EXPRESS APPOINTMENT.

16. Express appointment is direct authorization given by the principal to the agent empowering the agent to act in the principal's behalf.

An express appointment may be given orally or in writing by the principal to the agent. An agency may be created by spoken words and the creation of the agency is valid

in every respect and will give the agent proper authority to act in all matters except where a statute requires the appointment to be in writing. The appointment may be expressly made in writing by a contract of agency, by a letter or series of letters conferring the authority, or by a specific written authorization empowering the agent to act in one or more transactions.

When an agent is authorized to enter into written contracts in behalf of his principal, his authority should be in writing. It may not be absolutely essential as a legal proposition that his authority be in writing, for his authority to enter into written contracts may be implied from his apparent authority, or from a course of dealing in which he has frequently acted in the same manner in similar transactions.

STATUTORY REQUIREMENTS—STATUTE OF FRAUDS.

17. If an agent be authorized to execute a contract on behalf of his principal, the contract granting authority to the agent must be of as high a nature as the contract to be executed. If the contract to be executed is a simple one, whether oral or written, the authority of the agent may be oral, unless some statute requires a writing. If the contract to be executed is one required by law to be under seal, the authority of the agent must likewise be under seal.

The general rule is that the appointment of an agent should be made in a manner of equal solemnity with the act he proposes to perform. Hence if he is to execute written instruments his authority so to do should be evidenced by a written appointment. If he is to execute instruments under seal his appointment should be in writing under seal. In some states the seal has lost much of its ancient force

and effect and is considered as mere surplusage. In these states the appointment to execute sealed instruments would be valid without the necessity of a seal, if sufficient in other respects.

In all states, conveyances of realty must be in writing. Hence if the agent proposes to execute a conveyance of realty he must be appointed by a writing, usually under seal. This writing is called a "power of attorney" whether it authorizes the agent to convey realty or to contract with reference thereto in other respects. The person who is to take the deed or instrument executed by the agent should require that the agent present his power of attorney, properly executed, before he accepts the deed or instrument. In some states the Statute of Frauds does not require that an agent's authority to contract with reference to realty be evidenced by an appointment in writing unless he actually proposes to convey the premises. In these states the agent may contract with reference to realty without a written appointment and his acts will bind the parties, but if he proposes to execute a conveyance of the premises he must secure written authority from his principal to empower him to do so.

The requirements of the Statute of Frauds as to contracts of suretyship and guaranty, contracts not to be performed within a year, and contracts relating to the sale of goods differ in the various states, but if an agent proposes to execute any contract required by the Statute of Frauds in a particular state to be in writing his appointment should generally be in writing.

IMPLIED APPOINTMENT.

18. The appointment of an agent may be implied either from the relations of the parties or from their conduct.

An agency may be implied, just as a contract may be implied, from the facts and circumstances surrounding the transaction. The law will imply an agency either from the relations of the parties to one another or from their conduct. A partnership, as previously stated, is an example of an agency implied from the relations of the parties to one another. Chief among the other cases where such implication will arise are those of husband and wife and parent and child.

Agencies by estoppel and ratification, to be hereafter considered, are examples of agencies implied from the conduct of the parties.

HUSBAND AND WIFE.

19. A married woman is not the agent of her husband solely because of the marital relation. She may become his agent by implication of law to bind him for the purchase of necessaries where she is living apart from him because of his fault and he is not supplying her with necessaries.

A wife is not the agent of the husband nor is the husband the agent of the wife simply because they are married. The law, however, implies an agency in the wife to bind the husband for her necessaries where she is living apart from him through his fault and he is not supplying her with the necessities of life. The same rule holds where she has not left his domicile but he absents himself from her without cause. What are necessaries depends on the station of the parties in each case.

Although a wife is not her husband's agent simply because she is his wife, an authority to act as his agent may usually be readily inferred from the acts of the husband and wife, as where he permits her to trade in various ways.

Where a husband permits his wife to borrow work animals to be used for his benefit he will be liable if she borrows a mule and the mule dies from injuries received while being used under the wife's direction. (See Appendix B, Case No. 78.)

As a practical proposition a husband usually confers upon his wife an extensive authority to act as his agent by permitting her to act in his name in numerous transactions covering a considerable period of time. This authority may be revoked by the husband by his giving actual notice to those with whom she has dealt in his name, except that he cannot relieve himself from liability for her necessaries when it is his fault that she is in need of them. Very often a wife is possessed of means of her own and requiring her husband's aid in business transactions she authorizes him to act as her agent in such transactions. An agency may be implied from the circumstances here in the same manner that the relation will be implied where the husband permits his wife to act in his behalf. The wife, too, may revoke this authority by giving notice to those with whom the husband dealt in her name. It is the part of good business for the third person to satisfy himself of the real facts in the case before he deals with either the husband or the wife as the agent of the other when he is not acquainted with the parties or not depending on a prior course of dealing.

PARENT AND CHILD.

20. A child is not the agent of his parent by reason of the parental relation alone, except that the law will create an agency by implication for the child to bind its parents for necessaries, when the child is not supplied with such necessaries.

The authority of a child to bind his parent as the parent's agent is not implied by the law, except for the purchase of

necessaries, unless an express or implied authority of some kind is shown to have been conferred by the parent. Where a son was operating his father's automobile for his own pleasure or convenience and injured a pedestrian, there is no authority implied in the child to bind his parent to pay a physician whom the child hired to attend the injured person. (See Appendix B, Case No. 79.)

Where a parent sued another person for trespass for carrying away his yoke the defendant claimed that the son of the owner of the yoke loaned it to him. The court held that the son had no authority to loan his father's property unless such authority could be shown from the father's conduct.

Though the child's authority to act as the parent's agent must be shown either by proving express or implied authority this authority may often be readily shown from past acts in the same manner as it may be shown in the case of husband and wife.

The authority of a child to bind its parents for necessaries is a part of the natural law and generally is made part of municipal law by statutes. The law contemplates that a parent shall supply his child with the necessities of life and will therefore find his authority to bind his parent for necessaries from very slight circumstances.

Thus, where a father pays for his minor son's purchases without objection it will afford a reasonable presumption of agency with power to make the purchases.

However, a child may not bind the parent for necessaries where he is remaining away from his home without permission and is putting it out of the parent's power to furnish the necessaries.

Thus, where a child went away on a visit which was to last for a month but instead stayed away for more than two years over his father's objection, left the place he was visiting and

engaged a room for himself and charged room rent and clothing to his father the court refused to allow a recovery for the rent and clothing.

AGENCY BY ESTOPPEL.

21. An agency by estoppel is one wherein the principal is prevented, by reason of what he does or fails to do, from denying the existence of such a relation, though in fact not existing.

One may place himself in such a position by what he does or fails to do that all the circumstances of a certain transaction will fairly justify the presumption that he has appointed another as his agent. He is then estopped to deny that an agency exists, and he is bound by the other's acts. Where a person permitted an agent to retain possession of a mortgage and the notes which it secured and to collect the interest notes when due, the owner of the mortgage will be estopped to deny the authority of such agent to receive payments on the principal sum due. (See Appendix B, Case No. 80.)

Where an insurance company issues a policy and the insured pays the premium to the company and the company accepts the premium and says nothing; if a loss should occur later the company will not be heard to say that the policy was not in force because the person securing the application was not its agent. The company's actions conclusively show the contrary. It would be estopped to make this claim because all the circumstances would speak against it.

CHAPTER IV.

RATIFICATION.

22. Ratification Defined.
23. What Acts may be Ratified.
24. Requisites of Ratification.
25. What Constitutes Ratification.
26. Effect of Ratification.

RATIFICATION DEFINED.

22. Ratification, in the law of agency, is the adoption by a person of some act done in his behalf by another person assuming to act as his agent, either without any authority or in excess of actual authority.

When a person adopts the act of another person who assumes to act in his behalf as his agent, an agency by ratification is thereby created. By the act of ratification the agent is impliedly appointed as from the time the act is performed. In some cases, where the person assuming to act as agent does some act in another's behalf, or where one is actually the agent of the principal but exceeds his authority and performs an unauthorized act, the principal may choose to adopt the act so done and assume the consequent liability. He may, of course, if he chooses, repudiate the act so done, if he acts promptly and returns any consideration which may have been received in his behalf. In other cases, he may attempt to retain the benefits of the transaction, and at the same time deny the authority of the supposed agent. In cases of this kind the third person who has dealt with the agent may render the principal liable by showing acts of the principal which constitute a

ratification of the agent's act. Cases of this kind have been very numerous. As a practical proposition, it is sometimes extremely difficult to show an agent's authority by legally competent evidence, except by showing what acts the agent has done in his principal's behalf, and the principal's subsequent actions in connection with the transaction.

WHAT ACTS MAY BE RATIFIED.

23. **An unauthorized act done by one assuming to act as an agent may be ratified by the person in whose behalf the act was represented to have been done.**

The acts of an agent done in excess of his authority may be ratified by his principal.

An agent's torts may be ratified by his principal.

Ratification may be either express or implied.

A crime cannot be ratified.

The acts of a person, assuming to act as agent for another, but without authority from him, may be adopted by that other in express terms.

Thus, a real estate dealer makes out a contract of sale of certain real estate, and goes to a person and represents that he is the agent of the owner of the property and authorized to sell the same. The person to whom he makes the representation is willing to buy the premises and signs a contract for the purchase thereof on the promise of the dealer that he will later deliver a copy of the contract signed by the owner. The dealer then takes the contract signed by the buyer, and shows it to the owner, to whom he is a total stranger. The owner is willing to sell at the price named and is willing to pay the dealer a commission. He signs the contract and authorizes its delivery to the buyer, retaining the contract signed by the buyer. He has here expressly ratified the act of the dealer, who assumed, utterly without authority, to act as his agent, and an agency is created just as completely as if he had hired the dealer in the beginning and directed all his actions.

In the foregoing illustration, the person for whom the act was done by the unauthorized agent ratified the transaction in express terms. An unauthorized transaction, entered into by one who assumes to act as an agent without authority, may be ratified by the person in whose behalf the act was supposed to be done by the act of the supposed principal in failing to object to the act done, or by retaining the benefits thereof.

Thus, *A*, a farmer, has *B*'s horse in his pasture. Without authority from *B*, and without even asking *B*'s consent, he sells the horse merely because he received what he considered a good offer. He then remitted the purchase price to *B* and notified him of the sale. Here *B* could, if he so desired, set aside the sale, replevy the horse from the buyer, and hold *A* liable in tort for his conversion of the horse. However, he makes no objection and accepts the purchase-price. Here the sale is ratified by *B*'s action in accepting the purchase-price. It is implied from his conduct, in other words, his act of ratification operating as a retroactive appointment of *A* as his agent.

An agent's acts, done in excess of his authority, may be ratified by the principal in the same manner as an unauthorized act may be ratified.

Thus, *A*, an agent, is given authority by *B* to buy four horses for him. *A* exceeds his authority and buys five horses instead of four. The principal may, if he so desires, adopt the unauthorized act of the agent, and ratify the purchase of the five horses. If he says nothing and accepts the fifth horse, he will be bound by his act of acceptance in the same manner as if he had expressly ratified. Where an agent acts in excess of his authority, the principal has the right to repudiate the act done in excess of his authority if he acts promptly and returns any consideration which may have been received in connection with the transaction.

An agent's torts may be ratified by his principal, either expressly, or by implication from the principal's acts, after he has been notified of the commission of the tort.

Thus, where an agent had two men falsely imprisoned on account of some transaction arising in the course of his principal's business, and later notified the principal of their imprisonment, and the principal took no steps for the release or the discharge of the men imprisoned, the principal was held to have ratified the agent's tortious act of false imprisonment. (See Appendix B, Case No. 81.) When an agent uses fraud, misrepresentation or other tortious means in doing a certain act in his principal's behalf, and the principal ratifies the agent's act with knowledge of the fact, he thereby adopts such tortious conduct and the liability in damages attaching thereto.

Thus where an agent purchases wheat from a farm hand who has stolen it from his employer, and the principal, knowing the facts, ratifies the agent's purchase and accepts the wheat, the principal is liable with the agent for its conversion.

Where an agent is guilty of trespass in doing an act for his principal, and the principal ratifies the act, the principal is personally liable for the consequences of the tortious act.

A crime cannot be ratified because the principal would have no right to commit the crime in the first instance, hence he could of course delegate no authority to an agent to do the criminal act for him. If an agent commits a crime upon the orders of his principal, both the principal and the agent are principals in the commission of the crime. Each is in equal guilt with the other and each will be obliged to stand trial on the same charge and accept the same sentence. One cannot escape the consequences of a crime by charging another with its authorization.

In this connection there has been much litigation over the question as to whether or not a forged instrument can be ratified by the principal or by one who is looked to for ratification. The courts of some states hold that there cannot be such a ratification, for such ratification would be in the nature of compounding a felony, and therefore contrary to public policy and void. The courts of other states have held that one may adopt a forged signature and

assume the obligation under the instrument if he so chooses, so long as he does not also compound the criminal offense. The element of criminal intent must of course be present in every crime so that the person signing another's name must intend to forge the same and must have made some pretense of authority in making the forgery. In a case where an agent signs his principal's name with no criminal intent in so signing, merely intending to bind the principal, and the principal knew that it was so done or upon being informed was willing that it should be so done, he could without doubt adopt the signature as his own and thereby ratify the signature so made.

REQUISITES OF RATIFICATION.

24. Though an unauthorized act or an act in excess of authority may be ratified, there are certain conditions which must be present in the transaction to validate the ratification; as follows:

The ratifier must have been in existence at the time the act to be ratified was consummated.

The ratifier must be a person competent to act as principal.

The act must be one which the ratifier could have authorized in the first instance.

The ratifier must be fully informed of all the facts concerning the act to be ratified, unless negligent in ascertaining them, or intending to be bound nevertheless.

The ratification must be of the whole act.

If the previous authorization would have been required by law to have been in a certain form, the ratification must be in the same form.

The act to be ratified must have been done by one assuming to act as the agent of the ratifier.

The ratification must precede a withdrawal by the person with whom the agent dealt.

Where a person is looked to for ratification, he must act promptly upon learning the facts, if he desires to disaffirm, or he may be presumed to have ratified, especially if third persons are acting in good faith upon the supposition that the transaction was authorized.

As a contract of agency must conform to the principles governing any binding contract, a ratification likewise must possess the same requisites. There cannot be a contract with a non-existent person, hence a ratification cannot be made by a person not in existence at the time the person assuming to act as agent dealt with a third person.

Thus, a person acting for certain other persons who proposed to form a corporation dealt as an agent or promoter with a third person in the name of the corporation which had not yet been formed. The corporation was not a person in law until it had received its charter in the regular manner. The corporation when formed could not ratify the acts of the promoter which he performed before there was such a corporation, if the third person objected to the ratification. Of course the third person could waive his rights and consent to the ratification, after which the transaction would be binding on both parties.

The person proposing to ratify must not have been under any disability to contract at the time the act was done, therefore he must not have been naturally or legally incompetent to be a principal at the time the transaction to be ratified occurred.

Thus, a municipality which had no power to issue a certain class of bonds attempted after their issue to ratify their issu-

ance. It was held that the municipality could not ratify the issue, for this would be permitting it to validate an obligation which it had no power to create. The municipality being incompetent to enter into the contract in the first instance was incompetent to ratify the contract.

Where a corporation does not possess the power to enter into a transaction because the transaction is beyond the scope of its charter powers, it is incompetent to ratify.

At the time of ratification the person proposing to ratify must be fully informed of all the facts regarding the transaction he is to ratify. If the ratifier is not in full possession of all the facts supposedly done in his behalf, his ratification is incomplete, and its incompleteness will render it invalid. It is only just to the ratifier that he be informed as to every material fact concerning the act he is to ratify, for it would be manifestly unjust that he be prevailed upon to ratify the act while in ignorance of its full force and effect, as it might transpire that the concealment might be matters that he would not ratify under any circumstances. To state the proposition in another way: An agreement is essential to the validity of a contract. The parties know, or are supposed to know, to what they are agreeing. If a ratifier is not informed of all the facts, his agreement lacks the element of knowledge, and he cannot be held to it if he objects.

If the person who is called upon to ratify is placed in full possession of all the facts concerning the transaction, it is sufficient. It is not necessary that he know his legal rights under the transaction, as his ignorance of the law will not excuse him.

Thus, an agent sold his principal's stock in violation of the principal's instructions, and notified the principal of the sale. The principal said nothing for four months, and then accepted the money from the agent. He later claimed that he did not

know his legal rights, that he did not know at the time of his acceptance that he had a right to set aside the transaction if he chose. This will make no difference. He did know all of the facts in connection with the transaction, and his ignorance of his legal rights is immaterial.

The ratification must be of the whole transaction. One cannot ratify in part. The principal cannot abide by certain of the terms of the contract and default as to the others, for if this were the law, a person proposing to ratify could adopt that part of the transaction which benefited him, and repudiate the unfavorable portion. Where an agent secures subscriptions to a book on certain terms, the principal is bound by the terms of sale entered into by his agent, if he desires to hold the third person to the transaction. He cannot hold the subscriber to the purchase and seek to change the terms of the sale. (See Appendix B, Case No. 82.)

If the law requires that the contract which the agent enters into on his principal's behalf be in a certain form, as in writing, or in writing under seal, the ratification must be in the same form. The general rule in this connection, as heretofore discussed, is that the method of ratification must be of equal solemnity or dignity with the form required in the act to be ratified.

A person cannot ratify the acts of another unless that other assumes to act as his agent. If there is no such assumption, there can be no ratification, for the third person at no time dealt upon the belief that the person looked to for ratification was a party to the transaction.

The ratification must be precedent to a withdrawal by the third person. If the person proposing to ratify had the right to step forward and ratify the agent's act after the other person had withdrawn his consent to the transac-

tion, it would be manifestly unfair, for the ratifier would possess a decided advantage over the third person. If the person looked to for a ratification can refuse to ratify, then the other person interested has the right to withdraw at any time before ratification.

When a person looked to for ratification is notified of all the facts in connection with the transaction, it is his duty to disaffirm the act of the supposed agent promptly if he desires to relieve himself of liability, or he will be presumed to have ratified.

Thus, where an agent changed the form of a negotiable instrument and the principal was informed of the change and took no prompt action in disaffirmance of the act, he was considered to have ratified the agent's act. (See Appendix B, Case No. 83.) This rule is applicable whether the unauthorized act is already done, or is merely partly done.

Thus, where the principal discovers that a transaction is under way and partly performed, where one acted in his name either without authority or in excess of authority, he must, in good faith, ratify then, or disaffirm. He may not shut his eyes to the matter and ratify it if it turns out favorably or disaffirm it if it does not.

WHAT CONSTITUTES RATIFICATION.

25. Ratification may be either express or implied.

Express ratification occurs where the principal specifically approved of the act in so many words, either in writing or orally.

Implied ratification results from:

The principal's silence with knowledge of the facts.

The receipt and retention of benefits by the principal.

The institution of a suit by the principal to enforce the contract created by his agent.

Ratification may be brought about in several ways, any one of which is legally sufficient to constitute an adoption of the agent's act by the principal.

Ratification may be express or it may be implied from the principal's act. One who is competent to ratify may of course ratify expressly by written or spoken words.

The principal's intent to adopt his agent's acts as his own may be implied by his silence after he is informed of the facts in connection with the transaction in question.

Thus, where an agent in charge of his principal's store exceeded his authority by purchasing a delivery horse and wagon and using the same in the business, the principal, having knowledge of the fact by having seen the horse and wagon in use without objection on his part, impliedly ratified the transaction.

Where a principal, being present at the time of a sale by his agent, and hearing his agent make unauthorized warranties and give unauthorized terms, says nothing, he cannot afterwards repudiate the agent's act. His silence with full knowledge of the facts constitutes a ratification.

Where the principal accepts benefits accruing under the transaction consummated by an agent, he will not be heard to deny the agency. Where a railroad company used rails and supplies ordered by the president of the railway company, the company will be presumed to have ratified the purchase, in spite of the declaration by the company that the president had no authority to order such articles. (See Appendix B, Case No. 84.)

Where an agent unauthorizedly selling his principal's horse remits the purchase-price to the principal, and the principal accepts and retains it, he cannot afterwards deny that the agent had authority to sell the horse. The act of acceptance and retention is unmistakable proof that he concurs in what has been done, even though he may be dissatisfied.

If one looked to for ratification does not desire to ratify, he has abundant opportunity so to indicate by direct notice to that effect with a return of the consideration. Failing to avail himself of his opportunity to repudiate, it is only a fair inference that he adopts the act done. A ratification implied by silence after the receipt of benefits is sometimes called an "agency by acquiescence."

When a person who is looked to for ratification institutes a suit to recover the moneys due under the unauthorized contract entered into by an agent, he ratifies his agent's act in the most formal manner. He puts himself on record as a beneficiary in the transaction; and, after so putting himself on record, cannot make a claim inconsistent with his first claim.

In some cases slight acts have been held by the court to constitute ratification, as where a railroad company was held liable to pay for medical services when the division superintendent of the railroad made inquiries of the physician in charge of an injured employee, as to the injured man's condition. (See Appendix B, Case No. 85.)

EFFECT OF RATIFICATION.

26. The legal effect of ratification is that it relates back and makes the act ratified the act of the ratifier just as completely and definitely as if he had authorized it in the first instance.

Ratification cures any defects or limitations which may have been present in the original authority.

Ratification once made is irrevocable.

Ratification cannot affect rights previously acquired by third persons acting in good faith.

Where a principal ratifies the agent's acts, the law will consider that the agent's authority is thereby established,

and that his authority is of the same force and effect as if it had existed before the act was done. An old maxim of the law is:—*"Ratihabitio mandato aequiparatur"*—Latin—Ratification is equivalent to a command, meaning that in law the act ratified is of the same effect as if originally commanded to be done by the principal. There is an exception to this rule to the extent that ratification cannot relate back and operate to cut off rights of third parties intervening.

Thus, since a ratification makes the agent the principal's duly authorized representative, as from the beginning, it also cures any defects or limitations which may have qualified his original authority. In other words his authority is then complete and no question can be raised as to the scope of his authority to act for his superior. The ratification eliminates the question of scope of authority and confers all necessary authority to do the act in question.

A ratification when once made with full knowledge of the facts cannot be withdrawn or revoked. The ratifier cannot change his mind after ratification. He has abundant opportunity to act carefully and with forethought when the proposition of ratification is presented to him. After he decides to ratify he has elected to take the consequences of ratification, and cannot afterwards complain.

We have seen that a valid ratification binds the principal. It also binds the party with whom the agent dealt. When a principal ratifies his agent's unauthorized acts, the other party will not then be heard to call into question the agent's authority, but such third person is bound the same as though there had been previous authorization. Ratification is equivalent to precedent authority. The principal is bound by this rule, and so is the third person with whom the agent dealt.

CHAPTER V.

AUTHORITY OF AGENT—EVIDENCE.

27. Apparent Authority of Agent—Defined.
28. Written Authority—Construction.
29. Risk of Failure to Ascertain Authority.
30. Evidence to Prove Authority—Burden of Proof.

APPARENT AUTHORITY OF AGENT DEFINED.

27. The apparent authority of the agent to act in his principal's behalf depends upon the facts and circumstances of the particular case. In some cases the agent has a large apparent authority, and in others his apparent authority is extremely limited.

Apparent authority means the authority which an agent seems to have from the circumstances of the agency.

Authority is either actual or apparent. Actual authority is that which the agent is given by his principal. Apparent authority is that which third persons are justified in supposing the agent has, either from the acts of the principal or because similar agents have such authority. Actual authority may be greater than apparent authority, or it may be less, or it may be the same. Thus, let us suppose that, in a certain locality, it is customary for agents selling horses to warrant them, but not to sell on credit. An agent is appointed to sell horses, the owner plainly instructing the agent not to warrant the horses, but that he might sell on credit. In this case the actual authority as to giving warranties would be less than the apparent authority, while the actual authority as to credit would be greater than the

apparent authority. The person buying horses through the agent might hold the principal liable on a warranty under the apparent authority of the agent and hold him to the sale on credit under the actual authority, provided the exact amount of the authority of the agent was not known.

One judge defined apparent authority as "Such authority as a reasonably prudent man, using diligence and discretion, in view of the principal's conduct, would naturally suppose the agent to possess." Third persons generally deal with an agent on the strength of the authority which he appears to have. He may have a great deal of authority in one case, and very little in another; hence the person dealing with the agent should exercise care in keeping within the bounds of the agent's apparent authority at least, for it is frequently true that the agent's actual authority is less than his apparent authority. The third person should determine the agent's authority from those acts which his principal permits him to do in his behalf, from the way the agent acts with his principal's knowledge, from those things which the agent repeatedly does without objection from his principal, and from the authority with which the principal clothes the agent by leaving his goods or securities in the agent's possession and under his control. If an agent is the manager of a business, it may be presumed that he has apparent authority to do the ordinary acts necessary to conduct the business. If an agent is employed to sell his principal's goods over the counter, he can be presumed to have a very limited authority. The powers of the various classes of agents are considered in the subsequent chapters. We are here considering apparent authority as a general proposition.

Where an insurance company clothed its agents with apparent authority to collect premiums, it may be presumed

by the insured that the agent's authority continues until he is notified by the company to the contrary; until the company communicates this notification, it will not be heard to say that its agent does not possess the apparent authority to make the collections. (See Appendix B, Case No. 86.)

Where a person, being notified by a bank that his note is at the bank for collection and due on a certain day, goes to the bank in compliance with the notice, pays the amount due and receives the cancelled note from the bank at the time he makes the payment, the owner of the note would be estopped to deny that the bank had the apparent authority to collect the note; the fact that the bank had the note in its possession would be sufficient for the maker to presume that it had apparent authority to collect the same.

Where *A*, a merchant, had for years been dealing with *B*, an agent, and had sold him numerous bills of goods which had always been paid for by the agent's principal, *A* would know that *B* had apparent authority to purchase on behalf of his principal. He would be entirely justified in selling him future bills of goods in the same manner as he had in the past until he was notified by the principal that the agency had been terminated. Suppose, however, that *B* comes to *A* and requests a loan on behalf of his principal. Here is a course of dealing in which *A* and *B* have never engaged, and *A* would not be justified in presuming that *B* had authority either actual or apparent to negotiate the loan. *A* would be obliged, for his protection, to ascertain the authority of *B* to act in this new capacity.

Where *A*, a third person, closes a deal with *B*, an agent of *C*, and *A* is to be paid a certain sum of money by *B* at the time the deal is closed, and *B* produces a blank check signed by his principal, and proposes to fill in the amount, unless *C* has, to *A*'s knowledge, acted in a similar capacity in the past, *A* is not justified in assuming that *B* has blanket authority to fill in blanks in checks, and would be unwise to part with anything of value in exchange for the check without first making inquiry of *C* to ascertain the extent of *B*'s authority.

There have been a number of decisions to the effect that if an agent proposes to fill in a blank instrument not negotiable, signed by his principal, his authority is patently limited to the execution of the instrument in question, and that his principal has impliedly given him authority to fill in the instrument, by thus putting him in possession of the blank instrument, and that the principal is bound by his agent's act in completing the instrument. However, when an agent fills in blanks and completes an instrument over his principal's signature, his authority to complete the instrument does not give him authority to alter it after it is completed.

One frequently hears the phrase "ostensible authority." Ostensible authority is merely a form of apparent authority and refers particularly to the situation where a principal either with intent or by want of ordinary care causes or allows a third person to believe that the agent possesses authority to represent the principal. When an agent has ostensible authority an agency by estoppel is created, for the principal will not be permitted to deny the agency.

WRITTEN AUTHORITY—CONSTRUCTION.

28. Written authority by a principal to his agent is strictly construed by the courts.

The agent and the person dealing with him are bound to follow strictly the terms of a written authority. Where an agent is acting under a written authority, it is his duty and the duty of the person dealing with him to stay within the terms of the written authority. The principal has taken the precaution to restrict the agent's authority to the terms of the writing, and he will not be liable if transactions are entered into which are in excess of the powers thus specifically limited. Should the written authority given by the

principal be presented to the courts for their consideration, they will construe it strictly. In other words, they will hold interested parties strictly to the terms of the instrument. If an agent should present a written authority to a third person, and the third person should read it and misconstrue it, he could not afterwards complain, but would be bound by the strict terms of the writing, in accordance with the foregoing rule.

Thus, where an agent is given authority by a power of attorney to sell fifty feet of his principal's property on a certain street, and instead sells fifty-five feet, the principal may force the buyer to convey the additional five feet back to him, for the agent's authority was conferred in writing and was limited to a sale of fifty feet and no more. The authority to sell fifty feet would not imply an authority in the agent to sell more than fifty feet.

RISK OF FAILURE TO ASCERTAIN AUTHORITY.

29. A person failing to ascertain the extent of the agent's authority assumes the risk of any loss which may follow.

The law places upon the person dealing with an agent a certain duty and obligation to ascertain the extent of the agency. The scope of the investigation required to be made would be less in some cases than in others, but one may not deal blindly with one representing himself as an agent, and act solely on the agent's statements as to his authority. If this were not the law, responsible persons might repeatedly be held for the acts of irresponsible persons claiming to be their agents. It is a general rule of the law of agency that a principal is not responsible for an agent's unauthorized acts or statements, unless the principal in some way holds the agent out as having authority to do the act or to make the statement, or unless the principal by some act ratifies the

agent's unauthorized conduct. A third person dealing with an agent and failing to take proper precautions to ascertain the extent of the agent's authority will be the loser so far as any claim against the principal is concerned, if he depends solely upon the agent's claims and assertions as to his possession of authority. It is true that he has a right of action against the agent for the agent's breach of an implied warranty of authority, but it may develop that the agent is financially irresponsible, so that a judgment against him is uncollectible. The agent's legal liability would be of no practical benefit to the third person if the agent is not financially responsible, and a considerable loss might be the penalty which the third person would be required to suffer for his lack of diligence in failing to acquaint himself with the agent's authority.

It may be that in some cases an agent, honestly mistaken as to the extent of his authority, may make unauthorized statements upon which a third person may rely to his injury. This condition of affairs is unfortunate, but does not alter the rule of law. The safe course of procedure where there has been no prior course of dealing upon which the third person may rely is to protect himself by inquiring of the principal just how far he may safely go in dealing with the agent.

EVIDENCE TO PROVE AUTHORITY—BURDEN OF PROOF.

30. When litigation arises over the fact of the existence of an agency, the agency may not be proven by evidence of the agent's statements and admissions as to his authority, but must be proven by other evidence of authority, as by the acts of the agent and the principal in connection with the transaction in question.

The burden of proving the existence of the relation of principal and agent is upon the party alleging it.

If a supposed principal denies that another is his agent, and a third person seeks to prove on the trial of the cause that such person is in fact the agent of the supposed principal, he must produce evidence of acts done by the agent or by both the principal and the agent from which the relation may be fairly inferred by the court. The agent's statements, admissions or assertions as to his possession of authority are insufficient to prove the relation. The fact of the agency must first be shown before such statements of the agent may be heard. (See Appendix B, Case No. 87.)

Since an agency may be implied from the facts and circumstances surrounding the transaction, or by showing the ratification of the agent's acts by the principal, the party alleging the relation may offer evidence of this character, and if it is sufficient it will sustain his allegation, and the court will imply the existence of the relation.

Where one claims that an agency exists, the burden of proving its existence is upon him. The principal cannot be held until the relation is proven by a preponderance, or a greater weight, of the evidence. In other words, he must offer sufficient evidence concerning the acts done by the agent or by the principal, from which the court can fairly infer that an agency exists. Not only does the law place the burden of proving agency upon the party affirming it, but it also places upon him the burden of proving the extent of the agent's authority. This he may do by showing acts of the alleged principal and agent from which the extent and scope of the agency may be fairly inferred.

In considering disputed questions of agency the courts will disregard what the parties call themselves and decide the cases according to what the facts show the relation to be.

The important thing is not what the parties call themselves but what their relation to one another really is. One cannot be made either an agent or a principal by merely calling him by one or the other of these titles.

Although a statement by a person that he is an agent or a statement by an agent as to the extent of his authority cannot be offered in evidence to prove either the agency or the extent of the authority, a person making such statements can be placed upon the witness-stand, to testify to the facts which constitute his agency, and likewise the principal can be compelled to testify as to such facts.

CHAPTER VI.

AUTHORITY OF AGENTS IN GENERAL.

31. Authority of Selling Agent.
32. Authority of Agent to Purchase.
33. Authority of Agent to Execute Negotiable Paper.
34. Authority of Agent to Sell Real Estate.
35. Authority of Agent to Mortgage—Realty—Personalty.
36. Authority of Agent to Pledge.
37. Authority of Agent to Receive Payments.
38. Authority of Agent to Compromise.
39. Authority of Agent to Borrow or Lend.
40. Authority of Agent to Employ.

AUTHORITY OF SELLING AGENT.

31. An agent having authority to sell goods must ordinarily sell for cash.

An agent having authority to sell generally has authority to warrant the goods sold.

An agent who is employed to sell his principal's goods is supposed to sell for cash only, in the absence of instructions on this point. If he has no authority to sell for anything but cash, he cannot accept notes in payment, give credit, or sell upon the installment plan. Neither can he barter or exchange the goods or any part thereof. He is bound to make the best bargain he can in his principal's behalf. If his authority is limited to the sale of the goods at a certain minimum price, he may not sell for less than that price.

In some cases an agent sells by merely taking orders for his principal to fill, and this is the extent of his authority. In such a case he does not have any authority to collect or to sell on other than his principal's usual terms. In many instances this fact is prominently stated in the seller's invoices, and the customer will be presumed to have seen such notice, and will be the loser if he pays to an agent whose only authority is to solicit orders.

AUTHORITY OF AGENT TO PURCHASE.

32. An agent to purchase must not exceed the authority conferred by his principal, and must purchase in accordance therewith.

An agent authorized to purchase must exercise the authority conferred upon him by his principal. If he is empowered to purchase a certain quantity or quality or at a certain price or from a certain person, he must obey such instructions. If he is authorized to buy for cash he cannot buy on credit. If his power to purchase is general he has implied authority to do all acts and things necessary to carry out such power. He may instruct the seller as to the methods and place of delivery. If he has authority to purchase on credit, he has authority to acknowledge indebtedness in his principal's name. Whether his authority be to buy for cash or to pledge his principal's credit, such authority does not give him the right to execute notes in payment of goods purchased by him.

AUTHORITY OF AGENT TO EXECUTE NEGOTIABLE PAPER.

33. An agent's authority to execute or endorse negotiable paper is generally expressly conferred; though it may be implied from the circumstances. It is the

agent's duty to pursue strictly the authority conferred for this purpose.

An authority to execute or endorse negotiable paper, checks, notes, and so on is generally conferred in writing, and properly should be so conferred. If it is not so conferred it may be implied from the circumstances, as where the agent has frequently paid by check in the past, or where he is a general agent possessing broad powers, and all the circumstances would justify third persons in the presumption that he is empowered to act in this manner. Where one is dealing with an agent who proposes to execute or endorse negotiable paper, such person should inquire into the extent of the agent's authority to bind his principal in this manner.

Sometimes following the signature of a contract executed by an agent in behalf of his principal appear the words *"per procurationem"* usually abbreviated *"per pro."* This Latin expression means that the authority to the agent has been given in writing and that such written authority is on file for inspection by anyone interested and it is the duty of anyone becoming interested in a contract so signed to inspect such written authority. In other words everyone dealing with the agent is conclusively presumed to know the extent of the agent's actual authority.

These general rules of agency must be qualified to some extent to conform to the laws governing negotiable instruments. Negotiable instruments, being intended to pass freely as a circulating medium, are governed by laws intended to insure their negotiation with the fewest possible restrictions. An agent who is given authority to execute or to endorse negotiable paper will therefore bind his principal by his act of execution or endorsement if the negotiable paper is acquired by an innocent third person for value, designated by law as a "holder in due course," despite the fact that the agent may have exceeded his authority in some

particular. Though the agent's lack of authority might be raised as a defense by the principal as to the parties receiving the instrument in question, yet if such person should negotiate the note or other negotiable instrument to an innocent third person, before maturity and for value, the principal will be bound to honor the instrument.

The rule is the same where the principal gives negotiable instruments to his agent signed by the principal in blank, where the agent fills in the blanks before he transfers the instrument to a holder in due course. The holder in due course then has no means of knowing but that the instrument is the instrument of the principal given to the agent for the purpose of making payments, and the principal will be liable whether or not the agent exceeded his authority in filling in the instrument for a larger sum or upon other terms unauthorized by the principal. If, however, the agent proposes to execute instruments in blank, in the presence of the person receiving them, it is that person's duty then to inquire into the extent of the agent's authority, for he is apprised of the fact that the instrument is executed in blank, and there may be a limitation upon the agent's authority. Even in this case, the principal will be bound by the instrument executed by the agent if the person receiving the instrument transfers it to an innocent third person for value; for the defense of excessive authority cannot be raised as against a holder in due course. The principal is here liable, not only because of the provisions of the law with regard to negotiable instruments, but also because where one of two innocent persons must suffer a loss, the one whose action permitted the loss to be sustained, or who permitted the fraud to be perpetrated, will be called upon to bear the burden.

Some courts hold that where an agent is placed in possession of instruments executed in blank by his principal, the

principal has impliedly given the agent authority to fill in the blanks in any manner he sees fit, and that, having thus put it within the power of the agent to bind him by his execution of the blank instrument, he is responsible for the agent's act. Other courts hold that where an agent is in possession of an instrument executed in blank his authority is patently limited to the execution of the instrument in question, and that he has no other or further authority, and could not alter or change the terms of the instrument so filled in by him, after it had once been completed. Other courts hold that where an agent proposes to fill in a blank instrument executed by the principal, the person receiving such instrument is charged with the duty of inquiring into the agent's authority and the extent of that authority to complete the instrument. As before stated, when the instrument is a negotiable one, and is acquired by an innocent third person, before maturity and for value, the principal is bound whether or not the agent exceeds his authority.

The authority to execute a negotiable instrument must be strictly pursued. An agent having authority to execute a note does not thereby possess authority to authorize a renewal of the note. Authority to execute a negotiable instrument does not empower the agent to execute non-negotiable paper. Where an agent is empowered to execute and endorse checks, he is not thereby authorized to execute notes, and the authority to execute negotiable paper does not authorize the agent to execute accommodation-paper, that is, make his principal liable on instruments purely for the benefit of others. Where an agent is authorized to execute negotiable paper in certain amounts and on certain terms, he is not thereby authorized to execute negotiable paper for different amounts or on other terms.

Thus, where an agent has authority to execute a note in his principal's behalf, the note to be payable in six months, the agent has no authority to execute a note payable in sixty days.

The signature of the agent must always show that the instrument was executed on behalf of his principal. If the instrument does not show this fact on its face the agent is personally liable to the person to whom he gives the instrument. The question of the manner of execution is considered in a subsequent chapter.

AUTHORITY OF AGENT TO SELL REAL ESTATE.

34. An agent's authority to execute deeds conveying land or to execute contracts relating to land must be in writing, usually under seal, to be enforceable, as this is required by the Statute of Frauds.

An agent's authority to sell realty or to contract with reference thereto must be strictly pursued.

The requirements of the Statute of Frauds with regard to an agent's authority to convey realty or to contract with reference to realty have been discussed in a previous chapter. An agent empowered to sell realty must sell on the terms prescribed by his principal. A power of attorney to convey lands or to contract with reference thereto, being written authority, is strictly construed by the courts, and the agent and the purchaser must not violate the terms of the power. A power to sell lands does not give an agent the power to mortgage the same nor to trade them nor to execute a lease of such lands. An agent who has the power to manage his principal's realty, to pay taxes, to make out policies of insurance, and to pay all expenses in connection therewith does not have any authority to convey by mortgage or to sell his principal's realty.

AUTHORITY OF AGENT TO MORTGAGE—REALTY—PERSONALTY.

35. An agent's authority to mortgage his principal's real estate, a mortgage being a conveyance of realty, must be in writing, usually under seal, to comply with the requirements of the Statute of Frauds.

Where the agent's authority is to mortgage, he must execute his authority in the manner directed by the principal.

An agent cannot mortgage his principal's personal property unless he has express authority to do so.

A mortgage is a transfer of ownership as security, and, being in the form of a conveyance when it relates to lands, must be in writing, usually under seal, this being required by the Statute of Frauds. Authority to mortgage does not carry with it authority to sell, to lease, or to exchange.

An agent in possession of his principal's personalty has no authority to mortgage it unless this authority has been expressly conferred upon him in the proper manner. Mortgaging property is practically asserting ownership over it, and if the agent does this without authority he may render himself criminally as well as civilly liable. A third person proposing to take a mortgage from an agent should exercise a high degree of diligence to ascertain the extent of the agent's actual authority.

An oral mortgage of personalty being generally of no effect as against third persons, a mortgage of chattels should be in writing and recorded. A mortgage being required to be in writing, the agent should be authorized in writing if he proposes to execute a chattel mortgage. The various states have statutes governing the requirements as to execution, acknowledgment and witnessing of chattel mortgages, and these must be consulted and followed.

AUTHORITY OF AGENT TO PLEDGE.

36. An agent has no authority to pledge his principal's goods in the absence of specific authority conferred by the principal.

To pledge goods is to deliver actual possession thereof to another as security. This also amounts to a practical assertion of ownership; and an agent cannot pledge his principal's goods unless he has unquestioned and specific authority to do so. Since he cannot pledge his principal's goods for debts of the principal, he of course cannot do so for his own debt.

AUTHORITY OF AGENT TO RECEIVE PAYMENTS.

37. An agent authorized to receive payments must turn them over to the principal in the form in which he received them, unless given authority by his principal to do otherwise.

An agent having authority to receive payments cannot ordinarily deposit the funds collected to his own credit.

An agent having authority to receive payments cannot ordinarily endorse and cash checks received in payment.

An agent who is authorized to receive payments must as a general rule collect and turn the payments over to his principal in the form in which he received them. In the absence of conferred authority or unless he is a general agent handling a business too large to make this practicable, the agent cannot deposit the collected funds in his own bank account, or endorse checks received in payment and turn them into cash. (See Appendix B, Case No. 88.)

An agent whose duty is to collect cannot ordinarily take notes in lieu of cash. He cannot release the debt, cannot sell or transfer the claim, or extend the time of payment. Authority to collect interest does not give an agent authority to collect the principal of the debt. If the agent is authorized to collect the whole of a debt he may generally receive payment of a part thereof and credit the same on account. Authority to collect a debt may sometimes include power to employ counsel and to institute suits.

AUTHORITY OF AGENT TO COMPROMISE.

38. An agent does not, as a general rule, have authority to compromise disputed claims in behalf of his principal.

When authority is conferred upon an agent to compromise disputed claims in his principal's behalf, he may allow credits or make any arrangements necessary to effect a settlement.

Unless his principal has given him power to do so, an agent does not possess authority to settle disputed claims. This is a right which the principal should and usually does exercise. An agent to sell or an agent to collect cannot compromise disputed claims in order to effect a sale or to close an account, unless this power is given by the principal. Persons proposing to settle with agents should be sure that the agent's authority is broad enough to validate the settlement.

Where the agent does possess the authority to compromise disputed claims, he has the power to do whatever is necessary to secure a settlement; hence he may allow credits, extend the time of payment, accept personal property in lieu of cash, or accept notes or other securities.

AUTHORITY OF AGENT TO BORROW OR TO LEND.

39. An agent ordinarily does not possess authority to borrow for his principal or to lend his principal's money.

A principal may confer authority upon a general agent to borrow or to lend; but as a general proposition an agent does not possess this broad power. A person about to lend through an agent should ascertain positively that the agent has the power to negotiate loans for his principal. An agent ordinarily has no power to loan his principal's money, and should be extremely careful not to assume such authority, or he may render himself criminally as well as civilly liable, inasmuch as the turning over the money to another may amount to an appropriation of it by the agent.

AUTHORITY OF AGENT TO EMPLOY.

40. The agent may have authority to employ if the circumstances of the agency justify it.

The question of the agent's right to employ has been considered to some extent under the heading of "subagents." Generally when the volume of business transacted by an agent puts him in actual need of help to discharge his duties properly, he has authority to employ assistants or subagents. When an agent possesses authority to employ he may be presumed to have power to fix the terms of employment and the amount of compensation of those whom he employs.

CHAPTER VII.

AGENT'S DUTY TO PRINCIPAL.

41. Agent's Duty to Exercise Skill and Diligence.
42. Agent's Duty to Act in Good Faith.
43. Agent's Duty to Obey Instructions.
44. Agent's Duty to Make Full Disclosures.
45. Agent's Duty to Account.
46. Renunciation or Revocation—Liability.
47. Agent's Liability to Principal for his Torts.
48. Liability for Acts of Sub-agents.

AGENT'S DUTY TO EXERCISE SKILL AND DILIGENCE.

41. It is the agent's duty to exercise reasonable skill and diligence in transacting his principal's business.

It is the agent's duty to exercise the skill and diligence of a reasonably prudent man of business in discharging his principal's business. The degree of skill and diligence required of the agent may be greater in one case than in another. If he is a general agent in charge of his principal's business, he should use the same degree of skill and diligence as though the business were his own. If he is a special agent he must exercise the degree of skill and diligence necessary properly to complete the transaction in question. If an agent is employed because of his possession of special skill in a certain line of business he is expected to exercise such skill.

Thus, an agent who loans money for his principal must see that the security is sufficient and use diligence in collecting the

debt when it becomes due. An agent to collect must use diligence in pressing claims for collections. An agent to sell must use diligence to make a sale for a fair price.

The agent is liable in damages to his principal should he fail to exercise skill and diligence in pursuing his principal's business, and will also render himself subject to discharge by the principal.

AGENT'S DUTY TO ACT IN GOOD FAITH.

42. The agent is bound to act in the utmost good faith toward his principal in all matters connected with the agency.

The relation of principal and agent is one of trust and confidence, and the agent's duty is to act in the utmost good faith in all that he does in connection with the agency, both as to his dealings with his principal and as to all other transactions consummated by the agent in the course of his employment as agent.

All of the agent's acts must be done in connection with the transaction and the furtherance of his principal's business. The agent is therefore under obligation to his principal to be honest in his dealings with him and he cannot make secret profits through his agency. If he should do so the principal can either set the transaction aside or let it stand and recover the secret profits from the agent. If an agent acts for a purchaser of lands, he cannot take advantage of his position as agent to make a profit for himself, but all profits and advantages accruing in the transaction belong to the principal. (See Appendix B, Case No. 89.)

To illustrate further:—*A* having empowered *B* to sell a horse, *B* obtains an offer of $250 from *C*. *B* tells *A* that he

has received an offer of $150 for the horse, whereupon *A* directs *B* to sell the horse for that price. *B,* having sold the horse to *C* for $250, remits $150 to *A* and keeps the remaining $100. *A,* upon discovery of the fraud, either may set the sale aside or may permit it to stand and recover the $100 retained by *B,* as all of the profits of the transaction belong to *A*.

The principal has the right of election, in these cases, even if the contract should be advantageous to him. Though the agent sold his principal's property for more money than his principal authorized him to take, or bought property for him for a less sum than he was willing to pay, the principal may disavow his agent's acts if he chooses to do so. The principal may also discharge the agent for acts of this character, regardless of the nature of his contract with him.

An agent may not let a contract to himself, either directly or by subterfuge. It is his duty to contract with others in his principal's behalf, and he will not be permitted to let contracts to himself, in his own name, or through some one acting in his behalf. Likewise the agent may not sell his principal's goods to himself, nor purchase from himself without the principal's full knowledge and consent. Nor may he sell to or purchase from another person secretly acting for him. Should the principal discover acts of this character, he may rescind the letting of the contract or the sale or the purchase or may recover damages from the agent for his breach of trust, and may discharge him as well. On the same principle he cannot set himself up in business in competition with his principal, and be considered as properly or honestly discharging his duties as agent. The moment he places himself in any position in which he may be presumed to be antagonistic to his employer, he will render himself liable for an action for breach of contract, and to discharge without notice. Therefore an agent may not represent both

parties to a transaction without their full consent. If, however, he acts in such representative capacity with the consent of both persons, they are bound by his acts.

Since the law contemplates that an agent shall be constantly loyal to his principal, and that all acts performed shall be in the principal's behalf only, the agent will in no wise be permitted to take advantage of his position of trust to mulct his principal or to cause his employer a loss through information gained in the agency.

Thus, an agent in charge of his principal's real estate learning that his principal's property is about to be sold for taxes cannot obtain a good title thereto by purchasing at the tax-sale. The principal may go into a court of equity and compel the agent to transfer the title so acquired.

An agent in charge of his principal's business, knowing that the principal's lease of the place of business is a valuable one, cannot make arrangements for the lease to be granted to himself after the expiration of his principal's lease. In a case where an agent so acted, the court would order the transfer of the lease to the principal.

The agent cannot serve two masters and faithfully discharge his duty as agent; therefore the agent may not connive with a third person to perpetrate a fraud upon the principal.

Thus, *A* appoints *B* his agent to sell certain lands for him at $100 per acre. *C* tells *B* that if he will obtain *A*'s consent to sell 1000 acres of the land at $90 per acre, *C* will give *B* $93 per acre for the 1000 acres. *B* tells *A* that he has received an offer of $90 per acre for 1000 acres from *C*, whereupon *A* instructs *B* to sell the 1000 acres at $90 per acre. *B* then sells 1000 acres to *C* for $93 per acre and retains the additional $3 per acre. *A*, upon discovery of the fraud, may avoid the contract and apply to a court of equity and have the land conveyed back to him, or he may elect to collect the $3000 from *B*. This is on the principle that an agent to buy or to sell is bound to act

in good faith and to make the best bargain he can for his principal. If he takes any compensation from the other party to the sale, it becomes at once the property of the principal, and the law will not permit the agent to say that he received such compensation other than as agent for the principal.

AGENT'S DUTY TO OBEY INSTRUCTIONS.

43. It is the duty of the agent to obey strictly his principal's instructions.

The agent is the principal's employee, and he must follow his employer's instructions. If he is ordered to do a thing in a certain manner he must do so. Where an agent was instructed by his principal to return a draft to him, and failed to do so, he was held to have violated his instructions. (See Appendix B, Case No. 90.)

Where the agent is a general agent with broad powers, he must often use his judgment in following instructions. It may be presumed, if he has broad powers, that he is acting within the scope of his duties, and his acts will bind his principal, so that he must be careful not to run counter to his superior's directions in general. This does not mean that he must slavishly follow set rules as to minor acts, but that his acts in their general effect must be done in accordance with his principal's instructions. If he does not obey orders and act according to instructions, he will render himself liable in damages and give his principal cause to discharge him summarily. If he is a special agent he must pursue his special authority closely, for being a special agent he is not permitted much latitude in discharging his duties.

Thus, *A* empowers *B* as his agent to purchase *C*'s house. *B* must do the act he is empowered to do. If he purchased *D*'s house instead, though at a much better bargain, *A* will not be bound by the act, and can recover damages from *B* for his failure to obey the instructions given.

It is not the agent's duty to judge whether instructions are wise or businesslike. If the instructions are imperative he must follow them.

Thus, where an agent is authorized to buy goods of a certain kind, he is liable if he buys goods of an inferior quality. If he is instructed to ship in a certain manner, he must ship in that manner. If he is instructed to insure, he must do so. If he is instructed to sell for cash, he is responsible if he accepts notes or sells on credit. If he is instructed to sell for a certain price, he must not sell for a less price.

Where trustees of a school district were authorized by a vote of the district to sell school property for cash, but instead they sold the same for part cash and part notes, and the district refused to ratify their acts or to accept the cash and notes, it was held that the trustees acted in excess of their authority and the district was not bound.

Where an agent was empowered to borrow $1000 on a note payable in six months, and he signed a note payable in three months, he was held to have violated his instructions.

Where an agent was told to insure his principal's ship and he merely insured the cargo, he was likewise held in damages for the violation of his instructions.

Where an agent has discretionary powers in the discharge of his duties as agent, an honest attempt on his part to carry out the general instructions of his principal will exonerate him from liability, even if there has been a circumstantial deviation from instructions.

Sometimes there is an extraordinary situation to be met, as in the case of perishable goods, and in these cases the agent will be excused for a deviation from instructions if he acts in a manner calculated to benefit his principal under the unusual situation presented to him.

If the principal's instructions are not clear, the agent's duty is discharged when he uses his honest discretion in interpreting and carrying out such ambiguous instructions.

AGENT'S DUTY TO MAKE FULL DISCLOSURES.

44. It is the agent's duty to make full disclosures to his principal of all material matters arising in the course of the agency.

It is the agent's duty to communicate to his principal the facts concerning every material matter affecting the principal's interests, of which the agent may learn through his agency. (See Appendix B, Case No. 91.)

The requirement that an agent shall inform his principal of all material matters affecting the principal's business is necessary to enable the principal to protect himself properly.

Thus, an agent in charge of his principal's real property containing several railroad switch tracks used daily in shipping, upon being notified that the railroad company proposed to remove one of the tracks for some reason, or to change its location, should immediately communicate this fact to his superior.

An agent should notify his principal of any attachment levied on the principal's property, of his inability to insure a shipment, and of a non-payment of a note. An agent who is employed to sell land should promptly notify his principal as to facts arising which may increase the value of the land, if the principal was ignorant of such facts when he named his price.

Failure to give notice to the principal may cause him great loss, and the agent would be held to have been grossly negligent, liable in damages therefor, and subject to discharge. An agent, to protect himself, should communicate all material happenings to his principal. If he is in doubt as to their materiality he should communicate them nevertheless, for he can lose nothing by this course and can relieve himself of any possible liability. It will be seen later that the knowledge which the agent possesses in connection with his agency is imputed to his principal. In other words, notice to the agent is equivalent to notice to the principal;

hence it is incumbent upon the agent promptly to communicate all matters of seeming importance to his principal.

AGENT'S DUTY TO ACCOUNT.

45. It is the agent's duty to keep accounts of his transactions as agent, and to render a statement thereof to his principal when reasonably requested to do so.

The agent is under an obligation to keep accounts of all his transactions as agent, and to render an account to his principal of all moneys and securities coming into his hands as agent, upon the principal's reasonable request for such an accounting. It is only fair and businesslike that the principal should have an accounting by his agent whenever he wishes it, as the agent is dealing with the property of the principal. The agent's failure to render an account upon the principal's reasonable request will give the principal the right to revoke the agency. It is likewise the agent's duty not to mix his own property with that of his principal, or the principal's property with that of others, so that an account may be readily and correctly made.

The agent is under the duty to account to his principal even though the principal wrongfully revokes the agency or is guilty of any other breach of the contract.

RENUNCIATION OR REVOCATION—LIABILITY.

46. The agent has no right to renounce or to revoke the agency without cause; if he does so he incurs liability in damages to his principal.

An agent may renounce his agency for good cause without incurring liability.

Where an agent is under a contract with his principal to continue in employment for a designated length of time,

he cannot rightfully break his contract and terminate the agency before such term has expired. A distinction should be here noted as to his right and his power to revoke. He has the power to renounce or revoke, as a man has to break any contract, or to break the laws of the land, but he has no right to do so. His wrongful act in revoking without right will render him liable for the breach.

Many courts hold that where a contract of agency was entered into to continue for a definite term, and the agent renounces the agency without cause, his breach of contract will bar his recovery of even the pro rata portion he has earned under the contract.

Where an agent wrongfully renounces his contract of agency, the principal's only remedy is an action of damages, as there can be no specific performance of a contract of agency.

Where a contract of agency is in force without any definite time for its termination having been agreed upon, either the agent or the principal may terminate it without incurring liability.

Thus, where an agent is empowered to sell a piece of property for his principal, a number of other agents also having been authorized to sell the same property if they can find a buyer, and the agent is to be paid on a contingent basis if a sale is made, he incurs no liability for failure to act or for a renunciation of his agency.

Where the principal was guilty of breach of his contract, the agent is entitled to revoke the contract if he so desires.

Where an agent was under contract to sell his principal's coal in a certain city for a certain length of time, and the principal repeatedly sent coal of such poor quality as to be unsalable, the agent would here have the right to renounce the agency and hold the principal in damages.

The agent, upon renunciation, should give notice thereof to his principal. No particular form is required, so long as the principal is notified. If there is a dispute as to whether or not a notice of revocation has been communicated, it may be implied from the subsequent acts of the parties.

AGENT'S LIABILITY TO PRINCIPAL FOR HIS TORTS.

47. An agent who commits a wilful or unauthorized tort while acting as agent, thereby causing his principal a loss or rendering him liable in damages to a third person, will be liable in damages to his principal for such tortious act.

An agent is supposed to act honestly in discharging his duties. If he perpetrates a fraud or commits other tortious acts without authority from his principal, he will be liable in damages to his principal as well as to third persons. Such conduct will also give the principal the right to discharge him immediately and may in some cases prevent the agent from recovering for any services rendered. This rule does not apply of course when the agent does such tortious act at the principal's behest. The subject of tortious liability of the agent and his principal to third persons is discussed in a subsequent chapter.

LIABILITY FOR ACTS OF SUB-AGENTS.

48. As an agent is liable to his principal for his own wrongful and negligent acts, on the same principle he is liable to his principal for such acts of the sub-agents whom he appoints to assist him.

The agent's sub-agents are his helpers and act for him as well as for the principal. Therefore the agent is liable to

the principal for the acts of the sub-agents whom he employs, for their acts are considered his acts, just as the acts of the agent within the scope of his authority are considered the acts of his principal.

There is an exception to this rule in some states in the case of a bank appointing an agent in another city to collect for a customer of the bank. Some courts hold that when a bank selects a bank in another city to collect, the bank selected to collect is the agent of the customer and not of the bank making the selection, and that the bank making the selection is liable only for failure to exercise due care in the selection of the collecting agent. The courts of other states hold that the selected bank is the agent of the bank making the selection, which is an application of the rule that an agent is liable for the acts of his sub-agents.

CHAPTER VIII.

PRINCIPAL'S DUTY TO AGENT.

49. Principal's Duty to Pay Agent.
50. Principal's Duty to Reimburse Agent for Expenses.
51. Revocation by Principal—Liability.
52. Revocation by Principal—Where Agency Coupled with Interest.
53. Lien of Agent.

PRINCIPAL'S DUTY TO PAY AGENT.

49. It is the duty of the principal to pay the agent what is his due, in the absence of any fraud or misconduct on the part of the agent.

The contract between the principal and the agent must possess mutuality; in other words, as the agent owes certain duties and obligations to his principal, the principal is under certain obligations to his agent, one of which is to pay him what is his due for services rendered by him.

If an agent acts in good faith, obeys his principal's instructions, renders an accounting to him when requested, notifies him of all material matters arising in the course of the agency, exercises reasonable skill and diligence in the discharge of his principal's business, and is not guilty of any fraud or other wrong-doing, he is entitled to be paid by his principal. If, on the other hand, he should fail to discharge his duty properly in any of these particulars, so that his failure would amount to fraud or negligence, as where he falsifies orders, disobeys instructions or acts dishonestly, thereby causing his principal a loss, he will not

only subject himself to discharge by his principal, but will also lose his right to compensation. (See Appendix B, Case No. 92.)

PRINCIPAL'S DUTY TO REIMBURSE AGENT FOR EXPENSES.

50. It is the principal's duty to reimburse his agent for proper advances and expenses.

The sums which the agent advances in his principal's behalf in discharging the duties of the agency must be repaid by the principal so long as they are proper expenses and charges incurred in conducting the principal's business. If money is properly spent by the agent for the benefit of his principal, the principal must repay it to the agent, as the agent is discharging his principal's obligation, and is entitled to reimbursement for money advanced on his principal's behalf. Thus, where an agent to collect retained an attorney to sue on the principal's claims, and paid him a portion of his fees on account and advanced court-costs to institute the suit, the agent is entitled to reimbursement for the money so advanced.

The principal is not liable, however, unless the advance or expenditure by the agent was proper and one which the agent had a right to make.

Thus, where a newly appointed agent entering upon his duties settled up a former agent's account, he was not entitled to recover from his principal the money thus paid in settlement, as it was not a proper expenditure by him. It was his duty to inform his principal of the facts in the case and permit his principal to take such action as he may have thought proper.

REVOCATION BY PRINCIPAL—LIABILITY.

51. Where the agency is to continue for a definite term the principal may not revoke or renounce the agency

without cause. If he does so he will be liable in damages to the agent.

If an agent employed for a definite term be wrongfully discharged it is his duty to endeavor to obtain employment of a same character in the same locality. If he does not do so he cannot recover from his principal the amount which he could have earned in new employment.

The principal may revoke the agency without incurring liability if the term of the agency is indefinite.

If a contract of employment provides for termination of the relation by notice from either party the relation is terminated by such notice.

The principal may rightfully revoke the agency when the agent has been guilty of breach of his contract or of gross misconduct.

The principal has no more right to revoke or renounce the agency without cause than the agent has. Where the principal is under contract with the agent and the agency is to exist for a definite term, the principal has no right to revoke the agent's authority though he may have power to do so. The principal has power to revoke the agency, and may do so, either with or without reason, whether or not the agency is expressed to be sole or exclusive, or is to continue for a definite term, or even though the contract states that the agency is irrevocable. However, if the principal takes this action without right and revokes the agency, he will be liable in damages to the agent for such wrongful act. The one case in which a principal can not revoke the agency, that is, where he lacks power to revoke the agency, is where the agency is coupled with an interest, as explained in the following section.

When the principal without right revokes an agency created for a definite term, the agent may rescind the con-

tract and sue at once for the amount due him, or he may treat the employment as continuing and sue the principal for damages to cover the breach.

The agent's damages are ordinarily the amount agreed upon for the term of the agency. It is the agent's duty, in case such a contract is wrongfully revoked, to secure other employment of the same general character, and attempt to reduce the damages so far as possible. If he secures such other employment, the measure of damages will be the difference between the sum which he earns in the new employment and the amount he was to receive under his contract of agency. Where no amount of compensation was agreed upon, the agent will be awarded a reasonable sum; what his services are fairly worth.

If the term of the agency is indefinite, the principal may revoke without incurring liability, as the agent has the same right. A mere power to sell real estate is revocable at the will of the principal, that is the principal has the right to revoke the agency for the sale of realty at any time before the sale is actually made. (See Appendix B, Case No. 93.)

Where the letter of appointment to the agent contains no provision as to the duration of the agency, the agency is terminable at will. (See Appendix B, Case No. 94.)

If the agency by its terms is revocable, it may of course be revoked. If the contract of agency provides that a notice shall be given to the agent prior to the termination, such notice must be given. In the absence of acts by the agent which would justify an immediate revocation, though the principal may have the right to revoke, revocation does not become effective as between the principal and his agent until the principal notifies the agent of the revocation. An uncommunicated revocation does not defeat the agent's rights, either because of past acts or acts subsequent to such

revocation, for the agent cannot be held for acting without authority after such uncommunicated revocation. The revocation need not be formal, it is necessary only that the circumstances clearly show the principal's intent to revoke. Therefore, authority conferred in writing may be revoked orally. The same is true of an authority conferred under seal, so that a power of attorney may be revoked by spoken words so far as the rights of the principal and the agent are concerned.

The principal may revoke without incurring liability when the agent has in some manner been guilty of a breach of his contract, as where he has been negligent, or failed to obey instructions, or failed to act in good faith. It was held in one case that the agent's drunkenness was sufficient cause for a revocation of the agency and the agent's summary discharge. If the principal has a rightful cause for revoking the agency because of the agent's acts, but the principal, overlooking the agent's breach, retains him in employ, the principal later cannot urge the agent's previous breach as a cause for a subsequent revocation.

REVOCATION BY PRINCIPAL—WHERE AGENCY COUPLED WITH AN INTEREST.

52. Where an agency is coupled with an interest, the principal cannot revoke the agency.

An agency is coupled with an interest where the agent was given a financial interest in the subject-matter at the time authority was conferred upon him.

The rule stated in section 51 is the general rule. This rule does not apply, however, where the agent has an interest in the subject-matter of the agency. In such a case the agency cannot be revoked by the principal.

Thus, *A* loans *B* $500. As security for the debt *B* makes *A* his agent to collect $500 which *C* owes *B*. This is an agency coupled with an interest, which even death will not revoke.

The test to determine whether an agency is coupled with an interest is to ascertain whether the agent acquired an interest in the subject-matter at the time his authority was conferred upon him.

If he was given this interest at the time of the conferring of the power, as in the above example, the agency is coupled with an interest, and is irrevocable by the principal.

LIEN OF AGENT.

53. Statutes have been passed in many of the states giving agents of various classes a lien upon the property of their principal, to secure the agent's commissions, advances and expenses.

Most states have certain statutory provisions relative to liens of various classes of agents. The provisions of these statutes are so much at variance that the statutes of a particular state in question should be consulted to determine the rule in that state.

CHAPTER IX.

RIGHTS OF THIRD PERSONS AGAINST PRINCIPAL AND AGENT.

54. Agent's Contract Liability.
55. Agent's Liability Implied from Manner of Signing.
56. Principal's Contract Liability.
57. Liability of Undisclosed Principal.
58. Liability of Principal and Agent where Agency Revoked.
59. Liability of Principal and Agent for Torts.
60. Admissions of Agent to Bind Principal.
61. Notice to Agent as Notice to Principal.

AGENT'S CONTRACT LIABILITY.

54. An agent acting within the scope of his authority in his principal's behalf is not liable to third persons in connection with the contracts he creates.

An agent acting beyond the scope of his authority, or without authority, may render himself personally liable to third persons for breach of an express or implied warranty of authority.

It is presumed that an agent intends to bind his principal and not himself, and this he will do when he acts for a disclosed principal, within the scope of his authority as such principal's agent. Then his act is the act of the principal. He is relieved from personal responsibility. The rule is expressed in the Latin phrase, "*Respondeat superior.*"

The agent may, however, by acting in excess of his authority, render himself personally liable to a third person

toward whom he so acted. (See Appendix B, Case No. 95.) The same rule applies where the agent acts without authority. He may incur liability for breach of warranty of authority whether or not the warranty of authority was intentionally made when he knew that he did not possess such authority, or whether he acted mistakenly, believing that he possessed authority. The element of apparent authority must also here be taken into consideration. If the agent acted within the scope of his apparent authority, the principal will be bound by the agent's acts. Where the third person relies solely upon the agent's warranty of authority, the agent may render himself personally liable, but in such a case he cannot bind his principal by his unauthorized assertions.

The agent is personally liable to a third person with whom he deals when he represents that he was acting for a principal who was not in existence at the time the contract was entered into. He will render himself liable if he makes warranties of his own in addition to those his principal authorized him to make and such unauthorized warranties are beyond the scope of his apparent authority. He is bound when he knows of limitations upon his authority but deals with a third person as if he were fully authorized, and such act in excess of his actual authority was not within his apparent authority. He may also render himself personally liable when he is mistaken as to his possession of authority and acted honestly under the mistake, where he has nevertheless warranted an authority which he did not actually possess. If he exercised authority in this manner, and the act done was beyond the scope of his apparent authority so that the third person could not hold his principal, the third person could then hold the agent for his breach of warranty of authority.

He is likewise liable when he makes false representations as to his authority, for the making of such false representations was not within the scope of his apparent authority. In this case the third person may hold him civilly liable and sue him in damages for his breach of warranty of authority, and if the warranty of authority amounted to a fraud, the agent would render himself liable in tort. The agent's liability in tort is discussed in a subsequent section of this chapter.

Where the agent acts in such manner as to bind himself and to give the other person with whom he dealt a right to enforce the contract against the agent personally, then the agent may hold such other person to the contract, and enforce his right by suit.

AGENT'S LIABILITY IMPLIED FROM MANNER OF SIGNING.

55. An agent executing written instruments on behalf of his principal must so sign as unquestionably to bind his principal, or he will render himself personally liable thereon.

An agent must see to it that the legal effect of his signature to written instruments is to bind his principal, or he will render himself personally liable. An agent will be personally liable on negotiable instruments if the form of his execution on such instrument is not such as specifically to bind his principal. As has been stated, only the person signing a negotiable instrument can be held liable thereon. If an agent signs a check or note in the proper manner, he will bind his principal; but if he signs his own name only he is personally bound. If he signs incorrectly so that the legal effect of his signature would not be such as to bind his principal, he is personally liable. (See Appendix B,

Cases Nos. 96 and 97.) The same rule applies to the agent's signatures to sealed instruments or to simple contracts, because negotiable instruments must be so safeguarded as to pass freely from hand to hand. This rule is applied strictly.

The rule is somewhat relaxed in regard to other instruments, especially simple contracts, as the courts are somewhat governed by the evident intention of the parties. Nevertheless, for his own protection and to remove all doubt, the agent should so sign as specifically to bind his principal. The agent may be acting for his principal and may intend to bind his principal, but this will not make any difference, as a general rule, if his mode of signing is such as to bind himself. He must see that he so signs that there cannot be any question that he is an agent.

How then should an agent sign to relieve himself of liability? If he signs simply "Joseph Smith, Agent," "Harold Lockwood, President," or "Albert Grimes, Trustee," the words following the name are held to be merely descriptive, and do not relieve the person signing from personal liability. These added terms are regarded as means of identification only, as if the signature had been "Joseph Smith, Grocer." If, however, he signs "Frederick Thomas, by Joseph Smith, his Agent," or "The Davis Company, by Harold Lockwood, its President," or "Arthur Lawrence, Trustee of the Village of Glencoe," he binds his principal and relieves himself from liability. It is better to go a step further and put the correct description in the body of the writing to be signed, as above indicated, and then sign in the same manner, as for example:—

"This agreement entered into this first day of September, A. D. 1916, by and between Robert James, party of the first part, and Frederick Thomas, by Joseph Smith, his Agent, etc., etc.

"Witness our hands and seals the day and year first above written.

"Robert James.

"Frederick Thomas, by Joseph Smith, his Agent."

Agents frequently sign as follows, "Joseph Smith, for Frederick Thomas," or "For Frederick Thomas, Joseph Smith." These methods have been held to be good but are not as clear and definite as the modes of signatures above indicated. There have been innumerable cases in the law in which the form of an agent's signature has been called into question, and consequently a variety of rulings in the different jurisdictions. The above examples, given as correct examples, indicate the proper method to be used by the agent in signing on behalf of his principal, as upheld by the weight of authority.

PRINCIPAL'S CONTRACT LIABILITY.

56. The principal is liable for the acts of his agent done in the scope of the agent's apparent authority.

When an agent acts for his principal within the scope of his apparent authority as agent, the principal is bound, as the act is considered in law the act of the principal. If the act done by the agent was in excess of his actual authority but within the scope of the agent's apparent authority the principal still is bound. This is true even in case the agent was disobedient in carrying out the principal's instructions for if the principal clothes the agent with apparent authority to do a certain act he must abide by the consequences. The third person has a right to assume to some extent that the agent is acting within the scope of his agency if all appearances so indicate, especially if the principal has allowed the agent to act so as to create the impression that he has the authority to do the act in question.

The third person is also justified in dealing with the agent in the same manner in which he dealt in former transactions to which the principal may have made no objection. Of course if the third person knew that the act proposed was in excess of the agent's authority, or if the act was one entirely dissimilar from prior dealings had with the agent, or if the third person takes a chance that the act is authorized, he cannot then hold the principal.

The principal cannot relieve himself from liability to third persons by giving secret instructions to his agent; nor can the principal and agent have private agreements which will affect the third person's rights against the principal. (See Appendix B, Case No. 98.)

The principal cannot be held by a third person on a contract which he makes with the agent where he has acted in collusion with the agent, the intent of the agent and the third person being to impose on the principal by means of their collusive act. (See Appendix B, Case No. 99.)

LIABILITY OF UNDISCLOSED PRINCIPAL.

57. When an agent deals with a third person, and the agent fails to disclose his principal, the third person upon discovery of such undisclosed principal may elect to hold him instead of the agent if he acts within a reasonable time after his discovery of such undisclosed principal.

This rule is subject to the following exceptions:—

The undisclosed principal cannot be held when the third person elects to hold the agent.

The third person's right to hold the undisclosed principal is subject to the state of accounts between such principal and his agent.

An undisclosed principal cannot be held on instruments under seal.

An undisclosed principal cannot be held on negotiable instruments.

A principal is designated as "undisclosed" either when the third party does not know that there is any principal at all or if the third party is aware that the person with whom he deals is an agent but does not know who the principal is. Thus, if an agent be appointed to buy a horse for his principal the agent might represent to the seller of the horse that the agent is buying the horse for his own use; or the agent might inform the seller that the horse was being purchased for a third person without telling the seller who the third person is. In either case the principal is said to be "undisclosed."

If the agent dealing with a third person fails to disclose his principal, the third person may hold the agent liable as the other party to the contract. If the undisclosed principal is subsequently discovered by the third person he may elect to hold the undisclosed principal liable instead of the agent with whom he dealt. The reason for this is that the principal is the real party in interest and should of right be bound.

There are certain exceptions to the rule that the undisclosed principal may be held upon discovery. When the third person discovers the undisclosed principal, he has the right to choose whom he will hold, the undisclosed principal or the agent with whom he dealt. In such a case, however, he must make his election within a reasonable time, or his sole remedy will be against the agent. Once the third person elects to hold the agent, he thereby releases the undisclosed principal from liability and cannot afterwards disregard his act of election and hold the principal. The law does not permit the third person an indefinite time to make

up his mind. If a reasonable time passes, it will be presumed that he is permitting his transactions with the agent, as the other party to the contract, to stand. Likewise, his intention may be inferred from other acts, as by a suit instituted against the agent or by his declaration, either verbal or written, of his intention to hold the agent. An election cannot be presumed in any manner by sending bills to the agent or otherwise, before the third person knows that there is a principal who was undisclosed. In other words, his election must be made with a full knowledge of all the facts.

Where the principal has paid money to his agent to settle with the third person, and the state of accounts between the principal and his agent would show that it would be unjust to the principal and a hardship upon him to permit the third person to hold him, he cannot be held. (See Appendix B, Case No. 100.) The third person up to the time of his discovery of the undisclosed principal has dealt with the agent as an individual and afterwards to permit him to hold the principal, where the principal has acted in good faith and settled with the agent in the particular transaction, would be unfair to the principal, and would be giving the third person more rights than he ever contemplated that he possessed. For this reason an exception is made in the law in this connection, because a different rule would be harsh and inequitable. When the principal has settled with the agent in good faith, the third person's only remedy is against the agent.

The rule that an undisclosed principal may be held for the acts of his agent is not applicable to sealed instruments executed by such agent. The person in whose behalf a sealed instrument is executed is the only one who can be held thereon and if the principal's name does not appear upon the instrument he cannot be held.

A negotiable instrument does not fall within the above rule; for, as previously stated, only the person in whose name the instrument is executed can be liable thereon. As a consequence a negotiable instrument is of necessity an exception to the rule.

There can be no ratification by an undisclosed principal. Of course, third persons with whom the agent dealt may permit the principal to adopt the agent's acts, but if such third person objects and insists upon holding the agent, the principal cannot insist upon ratifying the agent's acts and force the third person to treat him as the other party to the contract.

A disclosed principal may ratify whether or not there was actual or apparent authority. This rule does not, however, apply in the case of the undisclosed principal for there was not known or represented to be any authority on the part of the agent to represent a principal.

Where an undisclosed principal obtains goods through his agent by means of deception, the third person is not bound to recognize such undisclosed principal. (See Appendix B, Case No. 101.)

LIABILITY OF PRINCIPAL AND AGENT WHERE AGENCY REVOKED.

58. **When an agency is revoked and notice of revocation is brought home to those with whom the agent dealt, neither the principal nor the agent is under any further liability to third persons for subsequent acts of the agent as such.**

Where the agency is revoked and third persons are not notified of such revocation, the principal will be

liable for acts of his agent subsequent to such revocation until notice of such revocation is communicated.

The agent may be held for breach of warranty of authority if he continues to act under an agency which to his knowledge has been revoked.

When an agency is revoked it is the duty of the principal to give notice of such revocation to those who dealt with such principal's agent. Such notice must be actually brought home in some manner to those who have previously dealt with such agent or the principal will continue to be responsible for the acts of such agent done within the scope of his previous authority. Notice of revocation need not be formal so long as it is actually communicated in some manner to those with whom the agent dealt prior to the revocation. Such notice may even be given by the agent. If the agent acted under a power of attorney, general in its terms, the principal will relieve himself from liability by recording a revocation of such power of attorney. If an agent deals with third persons after his agency has been revoked and he has knowledge of the fact of the revocation, though he may bind his principal if he acts within the scope of his apparent authority, he will be responsible to his principal for such unauthorized acts. If he acts as agent after such revocation, of which he has knowledge, and does acts in excess of his authority, so that the third person cannot hold the principal, the third person may then hold the agent.

Where a third person has dealt with a special agent, whose authority was limited to a particular act, the principal is not bound, after the act is performed, to communicate notice of revocation to the person with whom some special agent dealt, as a special agent's authority ends when he completes the transaction he was employed to complete.

LIABILITY OF PRINCIPAL AND AGENT FOR TORT.

59. The principal is liable for the torts of his agent when such torts are committed in the course and as a part of the agent's discharge of his duty as agent.

The agent is likewise liable in damages to third persons for his tortious acts.

Where a principal and agent become liable in tort, the injured person may sue the principal alone, or the agent alone, or both of them jointly.

The principle that an agent's act binds his superior applies as well to torts as to contracts. When an agent commits a tort in the discharge of his duty as agent, and the commission of such tort is within the scope of his duties, the principal will be bound. (See Appendix B, Case No. 102.)

The fact that the agent will also render himself liable for his tortious acts does not relieve the principal from liability if the act was done in the course and as a part of the agent's discharge of his duty. Of course, if the principal directed the agent to commit a tort, or in some way aided his agent in its commission, there is no question as to his liability. Then the principal and agent are joint tort-feasors (Latin, wrong doers, those who commit torts).

Thus, where an agent was employed to loan money for his principal and by his principal's authority and consent the agent charges usury to the borrower, the principal is a joint tort-feasor with his agent.

A sales-agent, who had been driving an automobile for his principal, reported that he had repeated trouble with boys "hitching on," and the principal told him to kick them off, if he was so troubled in the future. The agent followed the principal's instructions and kicked a boy so viciously as to knock

him from the machine and seriously injure him. The principal was liable with his agent for the tort committed.

The rule that a principal is liable for the torts of his agent is a good one and is just. It places the duty upon the principal of exercising care in the selection of his agent, and prevents him from hiding behind an agent's financial irresponsibility in event a tort is committed. It also prevents secret planning between the principal and his agent in attempts to practice frauds on persons with whom the agent deals.

Though the principal is liable for torts committed by his agent in the course of such agent's employment, he is not liable for willful and independent torts which his agent may commit. For such torts the agent is individually liable, as they were not authorized and their commission was unnecessary.

Thus, where a railroad station agent became abusive while checking a trunk for a person who had purchased a ticket, provoked a quarrel with the ticket-purchaser and engaged in a fight with him, the court held that the tortious act of the agent was not in the line of his duties; that he merely gratified his personal resentment and spite, and the railroad company could not be held for his tortious act.

Though the agent will render his principal liable for the commission of torts within the scope of his duties, he does not thereby absolve himself from liability. If the tort was authorized by the principal or if the principal aided in the commission of the tort, he is equally guilty with his agent; and the third person may hold either the agent or the principal or both the principal and the agent jointly. As before stated, if the tort is willful and independent, the agent may be solely liable and the principal may be exonerated. If a third person chooses so to do he may hold the agent solely,

if the agent was guilty of a tort. (See Appendix B, Case No. 103.) An agent cannot escape liability by charging his principal with responsibility for authorizing his tortious conduct.

Thus, where an agent became liable for false imprisonment in commencing suits for his principal, he cannot defend that he was acting under his principal's instructions. If he converts goods belonging to a third person he cannot defend that he acted as agent in so doing.

A principal cannot confer authority upon an agent to do an illegal act, hence an agent is liable as principal if he commits an illegal act. He cannot escape liability by saying that his principal ordered him to do the act.

Thus, where an agent sold liquor without a license, in a place where a license was required, he could not escape the consequences of his violation of the law by laying his acts at the door of a principal who, he alleged, had ordered such sale.

ADMISSIONS OF AGENT TO BIND PRINCIPAL.

60. **Admissions made by an agent as a part of his authorized acts are binding upon the principal.**

Admissions of an agent which he makes in the performance and as a part of the acts which he is authorized to do will bind the principal.

It is indispensable that an admission made by an agent, in order to bind his principal, must be made as a part of the act done. It is not a part of the act or acts done if it is made before or after the doing of the act, and in such case does not bind the principal.

Thus, where an agent made an assertion to a third person, that an article which he had sold on behalf of his principal was defective, and such admission was made some months after the agent left his principal's employ, such an admission on the agent's part would not bind his principal.

NOTICE TO AGENT AS NOTICE TO PRINCIPAL.

61. Notice to the agent acting in the course of his employment as an agent is notice to his principal.

If an agent possesses certain knowledge at the time of a transaction consummated during the course of his duties as agent, such knowledge will be presumed to be in the possession of the principal.

Thus, where a person notified an agent that he had paid a bill due to the agent's principal, and the principal afterwards through other employees attached such third person's goods for the debt, the principal, when sued for the wrongful attachment, was estopped to deny that the notice of payment given to the agent had not been received by him. In other words, the law conclusively presumed that he had received the notice which his agent had received and such notice was imputed to him as a matter of law.

The rule that notice to the agent is notice to his principal does not govern when the agent is under some duty not to make disclosures, or when it is found that the agent is acting adversely to his principal. When an agent is acting adversely to his principal's interests, as where he is converting his property or embezzling his funds, notice to the agent by a third person in respect to such property or such funds cannot be imputed to the principal.

Thus a banker employs a cashier and the cashier gives a bond to secure the faithful performance of his duties, such bond reciting that the sureties therein shall be immediately notified of any embezzlement by the cashier coming to the notice of the banker, otherwise the sureties will be discharged. The cashier embezzles money. In such a case the knowledge of the cashier of his own embezzlement would not constitute notice to his principal, the banker, so as to relieve the sureties from liability.

CHAPTER X.

PARTICULAR CLASSES OF AGENTS.

62. Factors.
63. Brokers.
64. Auctioneers.
65. Attorneys.

FACTORS.

62. A factor, commonly called a commission merchant, is an agent to whom owners send goods for such factor to sell on a commission basis.

A factor has authority to sell in his own name, to give credit, to receive purchase-money, to accept negotiable paper, and to make warranties.

A factor possesses broad powers; he receives his principal's goods, has them in his personal possession, and usually sells them in his own name. He has the implied powers conferred by the usages of the business of a factor, viz., to sell, to give credit to responsible purchasers, to receive purchase-money, to accept negotiable paper, and to make the usual warranties. He may not, however, pledge his principal's goods. (See Appendix B, Case No. 104.)

A factor's duties, as those of any other agent, are to act in good faith, to use diligence in making sales, and to account to his principal. He must also obey instructions; and, if his instructions from his principal should be specific, he is bound to follow them. He is bound to care for his principal's goods; and, if he agrees to insure, as he frequently does, he must carry out his agreement. The rights and duties to third persons are governed by the general rules

of agency governing undisclosed principals. A factor may sue in his own name to enforce the contract because he sells in his own name. The factor has a general lien on goods in his possession; and, if necessary, may sell sufficient of them to satisfy his lien. This lien is lost if he parts with possession of the goods.

Many states have passed Factor's Acts, which govern sales by factors. These are statutes passed as protective measures for innocent purchasers who buy from factors and who have no knowledge of any limitations upon his power to sell.

BROKERS.

63. A broker is one who acts as an intermediary. He brings the parties to a transaction together, and secures the execution of a contract.

Sometimes a broker merely brings parties to a transaction together, and again he may have authorization from one of the parties to act as his agent and execute the contract for his principal. The contract is generally made in the name of his superior, and he is not in possession of the goods, as is the case with a factor. The best known classes of brokers are: real estate, insurance, stock and merchandise brokers. The broker has little implied authority, and generally acts upon authority to do a specific thing. He is a special agent employed usually on a contingent fee basis, his fee being earned when he finishes the act he was employed to perform. Where a broker is employed to secure a purchaser, he is entitled to his commission when he produces such purchaser. (See Appendix B, Case No. 105.)

A broker, being a special agent, a mere negotiator, must strictly pursue his limited authority. Since the broker does not have authority to act in his own name, he may not sue

the person with whom he contracts for his principal to enforce the contract. The person in whose name he acted must institute a suit, if a suit is to be instituted. As a general proposition the broker does not possess authority to receive money in connection with a transaction which he closes, and the money must be paid over to the person for whom he acts.

AUCTIONEERS.

64. **An auctioneer is an agent employed to sell his principal's goods at public sale, usually selling to the highest cash bidder.**

An auctioneer has little apparent authority. His authority is generally limited to the authority conferred by his principal to conduct the particular sale in question.

An auctioneer possesses very little apparent authority. His authority is restricted to the authority conferred by his principal to conduct the particular sale in question. He has no authority to sell except on the owner's terms, and may not warrant the goods sold unless given express authority so to do by his principal. He is the buyer's agent to the extent that his entries in his book of sales will constitute a sufficient memorandum to bind the buyer, and the seller as well, to the contract of sale. Such entries are also sufficient to satisfy the requirements of the Statute of Frauds in those states where the Statute of Frauds, concerning sales of personal property, is in force.

A sale at auction is complete when the auctioneer accepts a bid as a final one. If a sale is without reserve, the auctioneer cannot refuse a bid, otherwise he may. Secret bidding by an owner or his agent will render a sale so made voidable for fraud. An owner can openly bid, unless the

sale is advertised or stated to be without reserve. An auctioneer has no authority to rescind a sale after the sale is made. After a sale is made, the authority of the auctioneer is exhausted, and he possesses no authority to take back goods and rescind a sale. Many states have statutes governing the conduct of sales by auctioneers.

ATTORNEYS.

65. An attorney is the agent of his client for the purpose of conducting the litigation of the client's suit or of transacting any other business for which he was employed by his client.

An attorney has a broad apparent authority, and his acts in the conduct of litigation or the completion of other transactions are binding upon his clients.

An attorney possesses a broad apparent authority. Where he is employed to conduct litigation for his clients, he possesses apparent authority to file all necessary pleadings in connection with the litigation, to make motions, to ask for and to grant continuances, and to bind his clients by his admissions made in connection with the case at bar. Where he is employed to represent his client in other transactions, he has apparent authority to bind his client by his acts in connection therewith. The client of course retains the right to discharge his attorney and to employ new counsel, and may in some instances revoke certain unauthorized acts which the attorney does; but as a general rule the client is bound by the action of his attorney. If the attorney should exceed his authority, his remedy is against the attorney.

CHAPTER XI.

TERMINATION OF RELATION.

66. Death of Principal or Agent.
67. Insanity of Principal or Agent.
68. Bankruptcy of Principal or Agent.
69. Revocation by Principal or Agent.
70. War.
71. Accomplishment of Object.
72. Change in Conditions.
73. Lapse of Time.

DEATH OF PRINCIPAL OR AGENT.

66. The death of the principal terminates the agency, except where the agency is coupled with an interest.

The death of the agent likewise terminates the relation.

The causes operating to terminate contracts generally operate to terminate a contract of agency; hence the death of either party terminates the relation, except where the agency is coupled with an interest. In this case, as previously stated, the agent is in a sense a partner in the agency, and it would be inequitable that death should eliminate the interest.

If a partnership is principal or agent, the death of a partner terminates the agency, because the death of one partner operates as a dissolution of the partnership. Where there are two joint principals, death of one of such joint principals operates to terminate the relation. Where the death of the principal is unknown, a third person subsequently dealing with the agent can acquire no rights against the principal's estate.

Thus, where an agent's principal was a soldier, and the agent made an agreement with a third person, but at the time of the making of the contract the principal had been killed in battle, such fact being unknown to either the agent or the third person with whom he dealt, the third person was not permitted to enforce the agreement thus entered into.

INSANITY OF PRINCIPAL OR AGENT.

67. The insanity either of the principal or of his agent will terminate the relation.

If either the principal or his agent becomes insane during the term of the agency, it is terminated by operation of law, for the reason that the insane person is no longer a competent contracting party. Though the acts of an insane agent may be binding upon the principal if the agent has sufficient intelligence to complete a transaction in behalf of his principal, the agent's insanity arising during the term of the agency will terminate the relation so far as any rights between the principal and the agent are concerned.

BANKRUPTCY OF PRINCIPAL OR AGENT.

68. Bankruptcy or insolvency of the principal terminates the relation.

The bankruptcy of the agent will terminate the agency if the bankruptcy or insolvency of such agent is connected with the agent's business.

Bankruptcy of the principal will terminate the relation of principal and agent, except that such bankruptcy of the principal will not operate to revoke the power of the agent when the agency is coupled with an interest. The agent may complete his contract and protect himself, if conditions are such as to make this possible. Bankruptcy or insolvency

of the agent will terminate the relation if the bankruptcy is connected with the agent's business as agent for his principal. If, however, the agent is merely carrying out his principal's instructions, or is simply a salesman, the fact that he becomes a bankrupt or insolvent will not affect the relation of principal and agent.

REVOCATION BY PRINCIPAL OR AGENT.

69. A revocation either by the principal or by the agent will terminate the agency.

Naturally, a revocation, whether rightful or otherwise, will terminate an agency, except where the agency is coupled with an interest.

The principal is liable for acts of his agent done a short time after the termination of the relation where third persons do not have any notice of such termination. Therefore, it is the principal's duty to notify third persons if he wishes to protect himself, and it is the duty of the agent to do no more acts as agent after the relation is terminated. If the agent assumes to act as agent with knowledge of the fact that the agency is terminated, he will render himself personally liable for such wrongful conduct.

WAR.

70. War between two countries will operate to terminate the relation of principal and agent where the agency involves dealings between residents of the warring nations.

As war suspends commercial intercourse between the hostile nations, contract relations existing between residents of the belligerents are likewise terminated, for it is not

only contrary to public policy to permit contracts of agency to remain in force, but it is virtually impossible for the parties to carry out their contract.

ACCOMPLISHMENT OF OBJECT.

71. When the object for which the agency was created is accomplished, the agency is thereby terminated.

When an agent is employed to do a particular thing, and he completes the transaction he was employed to complete, the agency is terminated, as the contract is fulfilled.

Thus, where an agent was employed to secure a loan and he secures the loan, the object of the agency is accomplished, and the agency is terminated.

CHANGE IN CONDITIONS.

72. Where there is a material change in conditions affecting the subject-matter of an agency, it will be terminated by such changed conditions.

Where an agency is created for a certain purpose, and new conditions arise which make it impossible to carry out the terms of the agency, the agency is thereby terminated.

Thus, where an agent was appointed to sell a horse and the horse died before the sale was made the conditions were so changed by the destruction of the subject-matter of the agency that the relation was thereby terminated.

Where there has been a legal attachment of the principal's goods which are the subject-matter of the agency, so that the principal loses control of them, the agency is thereby terminated.

Where the agent, before the performance of his duty and with the principal's consent, becomes adversely interested in the subject-matter of the agency, the relation is thereby terminated.

Where an agent is authorized to sell a house, and it is sold by the principal before the agent can sell it, and the agency is not an exclusive one, the relation is terminated, as the principal no longer has the right to authorize the sale of the premises in question.

Where an agent was appointed to sell liquor in a certain locality, and a law was passed prohibiting the sale of liquor in the territory in question, the contract was thereby terminated, as the agent could no longer lawfully carry on the agency in that particular place.

LAPSE OF TIME.

73. Where an agency is created to continue for a definite time, the relation is terminated at the expiration of such term.

An agency created to terminate at the end of one year will terminate at the end of the year. Where the contract specifically sets a definite time during which the agency is to be in force it ends at the end of the time stated and the later acts of the agent do not bind the principal if third persons are properly notified of such termination.

APPENDIX A.

FORM OF POWER OF ATTORNEY TO SELL AND CONVEY LAND.

KNOW ALL MEN BY THESE PRESENTS, That I have made, constituted and appointed and by these presents do make, constitute and appoint Richard Jones my true and lawful attorney, for me and in my name, place and stead to grant, bargain and sell the following described real estate, situate in the County of Cook and State of Illinois: (here insert description), for such sum or price, and on such terms, as shall seem to him just and proper; and for me and in my name, place and stead, to make, execute and acknowledge good and sufficient deeds for the said premises, with or without covenants and warranties, giving and granting unto Richard Jones, said attorney, full power and authority to do and perform all and every act and thing requisite and necessary to be done in and about the premises, as fully and to all intents and purposes as I might and could do if personally present, with full power of substitution or revocation, hereby ratifying and confirming all that my said attorney or his substitute shall lawfully do or cause to be done by virtue hereof.

IN WITNESS WHEREOF I have hereunto set my hand and seal the first (1st) day of October, A. D. 1916.

(Signature) JACOB SMITH. (Seal)

Sealed and delivered
in the presence of:
Arthur James.

STATE OF ILLINOIS }
COUNTY OF COOK } SS.

On the first day of October, A. D. 1916, before me, Harry Taylor, a Notary Public, in and for the County of Cook in the State of Illinois, appeared Jacob Smith, personally known to me to be the person whose name is subscribed to the fore-

going power of attorney, as having executed the same and then acknowledged the execution thereof as his free act and deed, for the purpose therein set forth.

Given under my hand and seal.

(Seal) HARRY TAYLOR, Notary Public.

FORM OF POWER OF ATTORNEY TO COLLECT DEBTS.

KNOW ALL MEN, That I, Jacob Smith, of Chicago, in the County of Cook and State of Illinois, do hereby make, constitute and appoint Richard Jones, of Chicago, in the County of Cook and State of Illinois, my true and lawful attorney, for me and in my name, place and stead to ask, demand, sue for, collect, receive and give receipts for all moneys, debts and demands of any kind and character, which are now due or shall or may become due, owing and belonging to, or kept from me by (here insert names of the debtors), and to do and perform all acts and things in the execution of the aforesaid business as fully and completely as I might were I present.

IN WITNESS WHEREOF I hereunto set my hand and seal this first (1st) day of October, A. D. 1916.

(Signature) JACOB SMITH. (Seal)

Signed, sealed and delivered
in the presence of:
Arthur James.

FORM OF POWER OF ATTORNEY TO CARRY ON BUSINESS.

KNOW ALL MEN BY THESE PRESENTS, That I, Jacob Smith, of the City of Chicago, County of Cook and State of Illinois, have made, constituted and appointed and by these presents do make, constitute and appoint Richard Jones, of the City of Chicago, County of Cook and State of Illinois, my true and lawful attorney, for me and in my name, place and stead to manage and carry on the business owned by me

and located at 100 Washington Street, City of Chicago, County of Cook and State of Illinois, to buy and sell goods for cash or on credit on my account, for such prices as shall seem meet, to sue, collect or compromise all claims due me or to become due to me in connection with the foregoing business, and to make and execute, sign, seal and deliver for me and in my name, all bills, bonds, notes or instruments in writing, which shall be necessary for the management of the said business; giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully and to all intents and purposes as I might or could do if I were personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or his substitute shall lawfully do or cause to be done by virtue hereof.

IN WITNESS WHEREOF, I hereunto set my hand and seal this first (1st) day of October, A. D. 1916.

(Signature) JACOB SMITH.

Signed, sealed and delivered
in the presence of:
Arthur James.

FORM OF REVOCATION OF POWER.

KNOW ALL MEN BY THESE PRESENTS THAT WHEREAS, I, Jacob Smith, in and by my letter of attorney made the first day of October, A. D. 1916, did make, constitute and appoint Richard Jones, of the City of Chicago, County of Cook and State of Illinois, my true and lawful attorney, for me and in my name, place and stead, to (here insert the power granted in the original letter of attorney) as by the said letter of attorney appears.

NOW THEREFORE, I, the said Jacob Smith, by these presents, do hereby revoke, countermand, annul and make void the said power of attorney dated October first (1st) A. D. 1916, and all power therein and thereby or in any manner whatsoever given or intended to be given to said Richard Jones.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this tenth (10th) day of October, A. D. 1917.

(Signature) JACOB SMITH.

Signed, sealed and delivered
in the presence of:
Arthur James.

APPENDIX B.

ILLUSTRATIVE CASES—Continued from page 289.

CASE No. 76.

BAXTER *v.* LAMONT.

(1871) 60 Ill. 237.

Facts: Baxter sued Lamont for damages for Lamont's alleged failure to comply with a contract to convey certain real estate in Cook County, Illinois. The contract sued upon was based upon the following letter:

"Janesville, April 21, 1870.

"Mr. E. N. Fay,

"Dear Sir:

"Your letter of yesterday by the hand of Mr. Story has been received, etc. In regard to the proposition made to exchange ten acres of my land at Irving Park for a house and lot in Freeport, I cannot think of it for a moment. I have an offer of $800.00 per acre net for it. Now, I desire, if I sell any, to sell the whole. My terms are, the party purchasing it to assume the mortgage now on it, due in one and two years from the twenty-second day of last March, of $5,275.00, the balance to be paid to me, one-third cash, the rest in one and two years, at 8 per cent. Now if you can sell it on these terms, within a few days, you can sell it for $800.00 per acre, net. I am in receipt of letters daily in regard to that property. I received a letter from a gentleman three days since, wishing to know the least I would take for it. I wrote to him he might have it for $900.00 per acre on the terms above mentioned.

"The property is not in the hands of real estate men to sell at present, excepting one party, and that is at $1,000.00 per acre, and I think it will bring it by the first day of next June.

"Yours respectfully,

"G. W. LAMONT."

When Fay received this letter he made the following contract with Baxter:

"THIS AGREEMENT, made this twenty-third (23rd) day of April, 1870, between G. W. Lamont of Janesville, Wisconsin, of the first part, and James Baxter, of the City of Chicago, of second,

"WITNESSETH, That the said party of the first part has this day bargained and sold to said Baxter the following described twenty acres of land in the County of Cook and State of Illinois:—(here follows description), for and at the price of eight hundred fifty dollars ($850.00) per acre.....and to receive in payment for the same, fifty dollars ($50.00), cash in hand. As soon as an abstract is placed in said Baxter's hands, which said Lamont agrees to furnish within a reasonable time, then said Baxter has thirty (30) days to examine the same, and so soon as he is satisfied with said title, Warranty Deed is to be signed by said Lamont and wife (if married) in the usual form; and it is agreed that then the said Baxter shall pay or cause to be paid to said Lamont the sum of Three Thousand Seven Hundred and Fifty Dollars ($3,750.00), and assume a certain mortgage on said premises of Five Thousand Two Hundred and Seventy-five Dollars ($5,275.00) payable in one and two years from the twenty-second (22nd) day of March last, and the balance of said purchase money to be paid half in one year and balance in two years, all of the unpaid principal to bear interest at eight per cent (8%) per annum, payable with each payment as it becomes due, and payable, and the said Lamont binds himself under a penalty of Two Thousand Dollars ($2,000.00), in case the title is not perfect, the said twenty acres of land, and which amount he agrees to pay said Baxter in such case, and also all other damages and expenses."

Lamont then refused to convey the premises to Baxter, as the contract entered into by Fay with Baxter in Lamont's behalf was different in terms from the authorization to Fay in Lamont's letter. Baxter then brought his suit.

Argument of Defeated Party (Baxter): Lamont's letter to Fay authorized him to make the contract sued upon, and Lamont had no right to refuse to convey under said contract.

Law Applied (Opinion delivered by Judge Breese of the Supreme Court of Illinois): The question presented is one of fact. Was the agent Fay authorized by the letter of April twenty-first to make the contract sued on? Comparing the contract made with the authority conferred by that letter, the answer must be, as the jury found, in the negative. The letter authorizes an absolute sale at a stipulated price, on specified terms. The contract gives the purchaser an option. There is no warrant for this in the letter. The purchaser by the contract had the option to forfeit the fifty dollars or complete the contract. He had thirty days after the abstract should be placed in his hands in which to decide. And this forms another objection to the contract made by Fay. There is no mutuality in it, for while Lamont could be compelled to perform, appellant could not be so compelled. In addition the agent has contracted that Lamont shall pay two thousand dollars in case his title is not perfect, and all other damages and expenses. It is very clear no such authority was given Mr. Fay by the letter of April Twenty-first.

Fay was a special agent for a special purpose, and it was the duty of Baxter to know the extent of his authority. This he was to see to at his peril.

CASE No. 77.

DOGGETT *et al. v.* GREENE.

(1912) 254 Ill. 154; 98 N. E. 219.

Facts: On November second (2nd), 1903, the defendant, Horatio N. Greene, at Owego, New York, conveyed to Julia F. Heyworth of Chicago, for a consideration of $45,000.00, a lot in the City of Chicago. The defendant's son, Frank C.

Greene, who lived in Chicago, had been in charge of the property in the city for some years, collecting the rents, etc. Julia F. Heyworth owned adjoining property, and the two families had been friends for many years. There had been occasional negotiations for the purchase of the property, by Mrs. Heyworth, through her sons, Warren and James, with Frank C. Greene, for about six years. In October, 1902, Doggett, one of a firm of real estate brokers, called on Frank C. Greene in reference to a sale of the property to Mrs. Heyworth, and was told by him that he would submit any proposition for a sale to his father. On October 30, 1902, Doggett wrote a letter to Frank C. Greene submitting an offer from Lawrence Heyworth, in the sum of $40,000.00 for the lot. On November 4, 1902, Frank C. Greene wrote Doggett saying that it would be useless to submit the offer to his father as he knew it would not be considered. The next day Doggett wrote Frank C. Greene making a proposition to lease the premises with an option to buy at a later date. Greene telegraphed the offer to his father, who replied by telegram: "Offer refused, will not lease, letter coming." About a year later, on November second (2nd), 1903, the lot was conveyed as above stated. Doggett, learning of the sale, sued for his commissions on the ground that it was through his efforts that the sale was made. Doggett claimed that he had entered into certain negotiations with Mrs. Heyworth, which she denied. He also claimed that he had seen a letter in Frank C. Greene's possession, containing this statement, written by the father: "Do not want to lease this property, but want to sell; and use your own judgment as to price." Horatio M. Greene denied that he had ever written such a letter. Doggett also claimed that Frank C. Greene had told him that he would accept $45,000.00 for the property and that if Doggett would get it from Heyworth he would pay his commission.

Argument of Defeated Party (Doggett): That it was through his efforts that the purchaser was produced and the sale consummated; that the younger Greene had authority from his father to fix a price for the lot and that such authority gave the younger Greene implied authority to employ a broker to assist him to find a purchaser.

Law Applied (Opinion delivered by Judge Cartwright of the Supreme Court of Illinois): There was no evidence tending to prove that Frank C. Greene had any express authority from his father to employ a broker, and authority to fix a price would not preclude his making the sale himself without the aid of a broker. Authority to fix a price or to sell the property given to Frank C. Greene gave him no implied authority to employ a broker in the absence of any evidence of an established custom for the employment of sub-agents to assist in the sale of the property. There was no evidence of any such custom or anything tending to prove that Frank C. Greene could not sell the property without the assistance of brokers. There was no evidence from which the jury could find that the employment of a broker was one of the necessary, proper and usual things to be done for the proper exercise of the authority to sell and use discretion as to the price. This is not a case where an agent was authorized to do some act which he could not do himself, and Doggett cannot recover, for authority to sell the property does not alone imply authority to employ a broker to assist in the sale.

CASE No. 78.

COX *v.* HOFFMAN.

(1838) 4 Devereux and Battle, 180.

Facts: Mrs. Hoffman, wife of the defendant, borrowed a mule from Cox's overseer. While the mule was being used in defendant's service, it was so seriously injured that it died. Hoffman was not at home when the mule was injured. When he was later told about the injury he told his wife that: "He was sorry, and that she had done wrong." The evidence showed that Mrs. Hoffman had previously, with her husband's approval, borrowed work animals from the plaintiff, and that she had been in the habit of borrowing work animals from another neighbor with her husband's approval.

Argument of Defeated Party (Hoffman): That he had not authorized the borrowing, nor approved of it.

Law Applied (Opinion delivered by Judge Daniels of the Supreme Court of North Carolina): A wife may become an agent for her husband. Such appointment of agent may be

inferred from acts, and the conduct of the proposed principal respecting her. When the relation of principal and agent is to be inferred from the conduct of the principal, his conduct furnishes evidence of the extent of the authority as well as of its existence. In determining questions of this character the general rule is that the extent of the agent's authority is measured by the extent of the usual employment of the agent by his principal. An agency may be shown by prior acts of the same character, which have been approved by the principal.

CASE No. 79.

HABHEGGER *et al. v.* KING.

(1912) 135 N. W. 166; 39 L. R. A. (N. S.) 881.

Facts: Charles King, the minor son of the defendant, had general permission from his father to run and operate his father's automobile. While operating his father's automobile for his own pleasure and convenience, he ran over and injured one Karge. It was agreed in the trial of the case that the accident was without fault on the part of Charles King. The injured person was taken to a hospital, and the hospital superintendent telephoned for one of the physicians who are plaintiffs in this case. Charles King took this doctor in his automobile to the hospital, and requested him to give the injured person every attention to save his life. He did not attempt to contract on behalf of his father, nor did the doctors communicate with the father at any time before the completion of their services, for the value of their services, and the first that the father knew that the physicians intended to hold him responsible for the amount of their bill was when he received a bill from them. This he refused to pay.

Argument of Defeated Parties (Habhegger *et al.*): Charles King, the son, had implied authority from his father to employ them for the services rendered.

Law Applied (Opinion delivered by Judge Timlin, of the Supreme Court of Wisconsin): We do not find any evidence tending to show that Charles King was authorized by his father, to employ the doctors for Karge. There is no evidence of ratification by the father, and the boy had in law no implied authority to employ physicians at the expense of his father.

CASE No. 80.

CRANE *v.* GRUENEWALD.

(1890) 120 N. Y. 274.

Facts: Mrs. Crane, by an attorney, Baker, made a loan to Gruenewald, of $8,000.00, to extend for a period of five years from December 2nd, 1875, with interest annually at seven per cent. The papers were left with Baker, and he was authorized by Mrs. Crane to collect the interest, but not to collect the principal. Baker received from Gruenewald two payments of $1,000.00 each to apply on the principal, after it had become due, and each time Baker produced the bond and mortgage, securing the loan. Baker later sold the bond and mortgage after forging an assignment of them, to the purchaser, and absconded.

Argument of Defeated Party (Mrs. Crane): Baker had no authority to collect sums on account of the principal, his sole authority being to collect the interest due on the mortgage.

Law Applied (Opinion delivered by Judge Parker, of the New York Court of Appeals): Where a mortgagee permits an attorney who negotiates a loan to retain in his possession the bond and mortgage after the principal is due, and the mortgagor with knowledge of that fact, and relying upon the apparent authority thus afforded, shall make a payment to such attorney, the owner will not be permitted to deny that the attorney possessed the authority which the presence of the securities indicated that he had. This rule comprises two elements,—first, the possession of the securities by the attorney, with the consent of the mortgagee, and second, knowledge of such possession on the part of the mortgagor. The appearance of authority to collect, furnished by the custody of the securities, justifies the mortgagor in making the payments to the attorney, as the mortgagor acts in reliance upon such an appearance, an appearance made possible only by the act of the mortgagee in leaving the securities with his attorney. The owner is estopped from denying the existence of authority in the attorney which such possession of securities indicates.

CASE No. 81.

FORBES *v.* HAGMAN.

(1881) 75 Va. 168.

Facts: David Mann, an agent of Forbes *et al.*, while acting in the management of their business, caused the arrest and imprisonment of Hagman and others. The evidence showed that Mann's acts were approved of and adopted by his principals. In fact, one of the defendants, they being partners, had cautioned their agent to be very careful as to government contractors. He said "They are awfully slippery fellows." About ten days after the arrest, the one partner came to Richmond and there was informed by the agent, Mann, that he had two government contractors, the plaintiffs, in jail, at the suit and on account of the firm. The agent's principal made no inquiry as to the grounds of the arrest, gave no directions, and took no steps for their relief or discharge, but merely remarked that "It had resulted as he expected."

Argument of Defeated Party (Forbes *et al.*): They were not bound by the act of their agent in causing the arrest and imprisonment in question.

Law Applied (Opinion delivered by Judge Burks of the Court of Appeals of Virginia): In this case there was a virtual ratification and adoption of what had been done by the agent, on the principle that a ratification relates back and is equivalent to a command. This principle applies as well to a tort, when done to the use or for the benefit of him who subsequently adopts it, as to a matter of contract. The test of liability in such a case is the consideration whether the act was intended to be done to the use or for the benefit of the party who is afterwards said to have ratified it. The defendants in the present case were partners, and each, therefore, was agent for the other in the partnership business, and when one of them received information from their common agent that such agent had in their names and for their use and benefit caused the arrest and detention, they then chose, without inquiry, as is expressly proved, to take the risk upon themselves, and to adopt their agent's act as their own. They certainly ought to be in fact, as in law they are, bound by his acts.

CASE No. 82.

EBERTS *v.* SELOVER.

(1880) 44 Mich. 519; 38 Am. Rep. 278.

Facts: Selover subscribed for a local history, giving his subscription to one Schenck, the agent of Eberts, and promised to pay $10.00 on the delivery of the book. The contract which Selover signed was printed in a little book, made use of for the purpose of obtaining such subscriptions, and on the opposite page in sight of one signing, was a reference to "Rules to Agents," printed on the first page of said book. One of these rules was that no promise or statement made by an agent which interferes with the intent of printed contract shall be valid, and subscribers were warned under no circumstances to permit themselves to be persuaded into signing the subscription unless they expected to pay the price charged. The evidence shows that when Schenck, the agent, solicited Selover's subscription, Selover was not inclined to give it, but finally told the agent he would pay his fees in the office of Justice, then held by him, which should accrue from that time to the delivery of the book, which should be received as an equivalent. The agent assented, and Selover signed the subscription, receiving at the same time from the agent the following paper:

"Coldwater, April 29, 1878.

"Mr. Isaac M. Selover gives his order for one copy of our history, for which he agrees to pay on delivery all the proceeds of his office as justice from now until the delivery of said history.

"EBERTS AND ABBOTT,
"Per Schenck."

Eberts delivered the history and demanded the subscription price, repudiating the undertaking of the agent to receive anything else as being in excess of his authority and void. The defendant relied on the undertaking in question, and brought into court four dollars and twenty-seven cents ($4.27), as the amount of his fees as Justice for the period named.

Argument of Defeated Party (Eberts): Selover was bound to pay them the entire amount of ten dollars ($10.00), as the agreement of their agent, Schenck, was in excess of his authority and void.

Law Applied (Opinion delivered by Judge Cooley, of the Supreme Court of Michigan): It may be true as Eberts insists, that the undertaking of his agent was in excess of his authority. When Eberts discovered what his agent had done, two courses were open to him, to ratify his contract or repudiate it. If they ratified it they must accept what the agent agreed to take. If they repudiate it, they must decline to deliver the book under it, but they cannot ratify so far as it favors them and repudiate so far as it does not accord with their interest. They must deal with the defendant's undertaking as a whole, and cannot make a new contract by selection of stipulations to which separately the defendant has never assented. It is necessary for the plaintiffs to make out their case to show a contract, for the purchase of the book. To do this it is essential that they show that the minds of the parties met on some distinct, definite terms. The subscription, standing alone, shows this, for it shows apparently that the defendant agreed to take the book and pay on delivery of the same the sum of ten dollars ($10.00). The paper given back by the agent at the same time constitutes a part of the same contract, and the two must be taken and considered together, and, when the two are taken and considered together, it appears that the defendant never consented to any purchase, except upon the terms that the plaintiff should accept his Justice fees for the period named, in full payment for the book. If this part of the agreement is void, the agreement is entirely void, for the defendant has assented to no agreement other than this.

CASE No. 83.

WARD *v.* WILLIAMS.

(1861) 26 Ill. 447.

Facts: Williams, president of the Southern Bank of Indiana, brought this action against Ward as the endorser of a bill of exchange. Ward wrote his name on the back of a printed form of a note, blank except the check mark, which was filled

with $3,000.00, and delivered it to one Lewis, on which to raise money for him, Ward. Ward and Lewis had previously borrowed money from the Southern Bank. On January 28th, 1858, Lewis presented this paper at the Southern Bank and applied for a discount. By Lewis' direction it was changed to the form of a bill of exchange drawn by himself, payable to the order of Ward, on the Metropolitan Bank, New York, at three months, and was discounted for Two Thousand Dollars ($2,000.00) by the bank. Out of the proceeds, Lewis paid a balance of One Thousand Dollars ($1,000.00) on paper that had previously been discounted at the Southern Bank, for the joint benefit of Ward and Lewis, and which had been lying under protest for some time. The balance he kept. Ward was immediately notified of the use which Lewis had made of the paper. The bill was sent to the Park Bank of New York in the regular course of business, and was protested for non-payment, April 28th, and Ward was duly notified. Williams wrote to Ward calling upon him for payment of the bill. Ward answered May 17th saying: "I do not desire to delay or interrupt any proceedings you may have in contemplation, and will be perfectly satisfied with any proceedings he (Williams) may see fit to take." On August 16th the bill was presented to Ward. He took it in his hands and read it, making no objection to the form of the paper, nor any objections whatever, but said that he would arrange to pay it to them if Lewis had not told him not to pay it. He again invited a suit by saying he wanted it brought to trial, that he would give no trouble, but would accept service and make no defense, and that if judgment went against him he would realize on his securities and pay it up. Williams then brought the suit.

Argument of Defeated Party (Ward): Lewis' act in changing the instrument in question to a bill of exchange was in excess of his authority, and that he did not consent to such act done in excess of his agent's authority.

Law Applied (Opinion delivered by Chief Justice Caton of the Illinois Supreme Court): Where an agent is authorized to do an act, and he transcends his authority, it is the duty of the principal to repudiate the act so soon as he is fully informed of what has been done in his name by the agent, else he will be

bound by the act as having ratified it by implication. Here Lewis transcended his authority, but his act in excess of authority was subsequently ratified by Ward, if not in express terms he did so by the strongest implication. If he was not in full possession of all the facts with regard to the instrument at the time that Lewis secured the money, he was informed of the full extent of the alterations when the bill was presented to him for payment by Williams. He then took it in his hands and examined it. Neither then nor at any other time did he make any objections to the alterations which had been made, or deny that it was a genuine piece of paper, as it then stood. He made no objections to it on his own account, and did not make a pretense of having any objections other than an instruction from Lewis not to pay the bill. If this was not an express ratification of the form which Lewis had given to the paper, it was a ratification by implication, of the strongest possible character.

CASE No. 84.

SCOTT *v.* MIDDLETOWN, UNIONVILLE AND WATER-GAP RAILROAD COMPANY.

(1881) 86 New York, 200.

Facts: One Culver was president of the Middletown, Unionville and Water-Gap Railroad Company, and Scott made a contract with Culver to sell the railroad company a quantity of iron rails, spikes, bolts, etc. The supplies in question were delivered to the railroad company and subsequently used for laying tracks on an extension of the defendant railroad. The railroad company refused to pay for the material, and Scott brought suit against them for the purchase price of the articles in question.

Argument of Defeated Party (Railroad Company): The president of the railroad company had no authority to make the purchase; that a board of directors was in charge of the operation of the railroad, and that no express or formal action by the board of directors conferring authority upon Culver to make the purchase in question was shown, and that having no knowledge of the purchase by Culver the board could not ratify without knowledge of the terms of the contract.

Law Applied (Opinion delivered by Judge Finch, of the New York Court of Appeals): That the president of the defendant corporation had no authority to incur the liability in question was conceded by the lower court in its charge to the jury. Plaintiff's right of recovery was put upon the ground that the iron bought by the president was used in an extension of the company's tracks, without protest or dissent from the board of directors, who acquiesed in and thereby ratified the original purchase. The fact that the iron was accepted by the company and was laid in the company's track and appropriated to the company's use, justified the jury in the natural and necessary inference that the said directors had some knowledge of the purchase in question. The defendant's receipt of the property bought by its president, and its use of such property for corporate purposes for which such material was designed, were an adoption and ratification of the act of the officer, and the directors using the material purchased were bound to inquire and presumed to know whether it was paid for or not.

CASE No. 85.

THE CAIRO & ST. LOUIS RAILROAD COMPANY *v.* MAHONEY.

(1876) 82 Illinois, 73.

Facts: An employee of the railroad company had been seriously injured while in the discharge of his duties on the railroad. Mahoney was a surgeon who attended the injured man after the accident. One Clark was station agent for the company at Murphysboro, near where the employee was hurt. No physician would treat the wounded man unless employed by the company. Hinckley, the general superintendent, was then at St. Louis. The station agent sent Hinckley a dispatch saying "No doctor would treat wounded man unless employed by company." In answer to the telegram, Clark testified that he was authorized to take care of the wounded man, the only qualification being that the bill for such attention should be a reasonable one. He then employed Mahoney to take charge of the injured man. The next day after the employee had been injured, the general superintendent of the company came to Murphysboro and inquired of the station agent how the man was

getting along. No objection was made in reference to Clark's act in employing Mahoney. A few weeks subsequently, the superintendent was talking with Dr. Mahoney, and informed him that the pay would be all right.

Argument of Defeated Party (Railroad Company): The railroad company's employee had no authority to employ the physician.

Law Applied (Opinion delivered by Judge Craig, of the Supreme Court of Illinois): The jury were warranted from the facts proven, in finding that the employment of Dr. Mahoney by the station agent was ratified by the conduct of the general superintendent. Although the agent Clark may not have had express authority to employ Dr. Mahoney, yet slight acts of ratification by the company would ordinarily satisfy a jury that the employment was the act of the company.

CASE No. 86.

SOUTHERN LIFE INSURANCE COMPANY *v.* MCCAIN.

(1887) U. S. Supreme Court.

Facts: The life of one McCain, a resident of Alabama, was insured by the Southern Life Insurance Company, a Tennessee corporation, in the sum of $5,000.00, the policy being dated December 10, 1868. The policy was delivered by one B. F. Smith, an agent of the company, and the first premium paid to him. The second premium, due on December 10, 1869, was paid on December 5, 1869, to Smith's sub-agent. Before December 10, 1869, the sub-agent turned the amount collected over to Smith, and it was credited on Smith's account to the company in April, 1870. It was shown by the account that the company received the amount of the premium. After it was received McCain was not notified that Smith was not the company's agent at the time of the payment, and the company made no objection that it was not properly paid. McCain died in June, 1870. The company refused to pay the amount of the policy, and the beneficiaries sued to recover on the policy.

Argument of Defeated Party (Southern Life Insurance Company): Smith was not authorized to receive the payment

as his agency had previously ceased. It was a rule of the company that when an agent accepted the agency of another company, his agency terminated. This Smith had done. Further, that the company's agents were only authorized to collect renewal premiums upon special receipts sent from the company's office, signed by the company's president or secretary, and countersigned by the company's agent. No such receipt was given in this case.

Law Applied (Opinion delivered by Justice Field of the United States Supreme Court): Where a company has employed an agent in a particular business those who deal with him in that business have a right to rely on the continuance of his authority until the company in some manner informs them of the revocation of the agent's authority. No company can hold one out as its agent and then disavow responsibility for his acts.

Special instructions limiting the agent's authority must be communicated to third persons dealing with such agent, or the principal will be bound to the same extent as if the specific instructions were not given. Good faith requires that the principal should be held for the acts of one he has publicly clothed with apparent authority to bind him.

The company's silence, after receiving the statement of the agent, was equivalent to an adoption of the agent's act. It does not appear that the company ever objected to the payment of the premiums to the agent until the death of the insured. Then it was too late. The company cannot be permitted to be in a position where it can retain the premium if the assured lives, and repudiate it if he dies.

CASE No. 87.

HATCH *v.* SQUIRES.

(1863) 11 Mich. 185.

Facts: Hatch having taken possession of certain property as agent of McCormick, Squires replevied it, claiming that he had acquired a right to it through Walker as agent of McCormick. On the trial of the case considerable evidence was given by Squires of acts, declarations and promises of Walker.

Argument of Defeated Party (Squires): Having given evidence of Walker's agency by proving Walker's acts and assertions, he was entitled to recover, inasmuch as he had acted upon such acts, promises and declarations of the said Walker.

Law Applied (Opinion delivered by Ch. Just. Martin of the Supreme Ct.): This case hinges upon the admissibility of the acts and declarations of Walker who purported to act as agent of McCormick, and there was no proof of such agency. The authority of an agent must be positively shown, either by proving his authority to act, or by proving his act with the knowledge and recognition of his principal. In this case nothing of the kind was accomplished or attempted. The only attempt to prove the agency of Walker was by proving his own acts and assertions, and this is insufficient; and as these were not binding upon McCormick they are therefore not binding upon Hatch. An agent's authority cannot be proved by his own assertion alone. There must be some evidence of authority beyond his assertion, or of ratification of his acts before any party can be bound by such acts. There was error, therefore, in admitting evidence of the acts, declarations, and promises of Walker upon the trial of the cause in the lower court.

CASE No. 88.

JACKSON *v.* NATIONAL BANK OF MCMINNVILLE.

(1893) 92 Tenn. 154; 20 S. W. 802; 36 Am. St. 81; 18 L. R. A. 663.

Facts: Jackson, Mathews & Harris, wholesale grocery merchants, employed Gibson as a traveling salesman. It was his duty to take orders from merchants for goods, and to collect the bills therefor as they became due. Gibson sold a bill of goods to Meadows. Before the bill became due and while Gibson was still in the employ of Jackson, Mathews & Harris, he suggested to Meadows that if the latter would then pay the bill he would allow him a discount of two per cent. Meadows agreed and gave Gibson a check on the National Bank of McMinnville, writing on the check that it was in full of account to date. Gibson endorsed the names of his principals, "Jackson, Mathews and Harris, by Gibson," on

the back of the check and presented it at the National Bank of McMinnville, where it was paid to him and charged against Meadows' deposit account. Gibson failed to pay over the amount collected to his principals, who, after learning that he had collected other money and failed to account to them, discharged him. Gibson thereupon absconded. Jackson, Mathews & Harris then sent Meadows a statement of account and requested its payment. Meadows replied that he had paid Gibson. Jackson, Mathews & Harris then demanded the amount of the check from the bank which had paid the same on Gibson's endorsement. The bank refusing to pay, suit was brought.

Argument of Defeated Party (Bank): Gibson was authorized to endorse his principals' name to checks and to receive the money on such checks; that if he was not expressly empowered so to act, he was empowered by implication, as he had acted in the same manner upon previous occasions, and therefore Gibson's principals were estopped to deny his authority to act in this manner.

Law Applied (Opinion delivered by Judge Holman of the Supreme Ct.): All the members of the firm employing Gibson testified that he had not been empowered to use the firm's name on checks received in payment of goods.

In order that the authority to make or endorse commercial paper as the agent of another may be implied from other express authority, it must be shown to be strictly necessary to the complete execution of the express power. The rule is strictly in force that authority to endorse negotiable paper as agent will not be implied from express authority to transact some other business, unless it is absolutely necessary to the exercise of express authority. Possession of a check payable to order by one claiming to be agent of the payee is not proof on the face of it of authority to demand payment of it in the name of the true owner. A bank is obliged by custom to pay checks payable to order, and pays them at its peril to any other than the person to whose order they are made payable. It must see that the check is paid to the payee therein named, upon his genuine endorsement, or it will remain responsible. An authority to receive checks in lieu of cash in payment of bills

placed in the hands of an agent for collection does not authorize the agent to endorse and collect the checks. The endorsement of the checks was not a necessary incident to the collection of accounts. It follows that a salesman employed to sell and to take orders for goods, to collect accounts, and to receive money and checks payable to the order of his principals is not by implication authorized to endorse his principals' name to such checks. The laws governing negotiable paper are the growth of ages, and the result of experience, having their origin in necessity. The inflexibility of these rules may occasionally make them seem severe, but in them is found general security.

CASE No. 89.

SALSBURY *v.* WARE.

(1900) 183 Ill. 505; 56 N. E. 149.

Facts: In September, 1890, Salsbury employed Ware, a real estate agent in Chicago, to purchase for him as his agent certain lands in Jasper County, Indiana. Ware, in pursuance of such agency, purchased one tract of land of 720 acres from Ingraham, at the price that Salsbury then supposed, and was informed by Ware, of $12.00 per acre, or $8,640; and another tract of 480 acres from Wood at the price, as Salsbury then supposed and was informed by Ware, of $8 per acre, or $3,840. Salsbury paid to Ware the prices named for the said tracts upon the representation by Ware that the lands cost the said amounts per acre, and received from Ware conveyances thereof from Ingraham and Wood, under the belief that Ware in fact paid Ingraham and Wood the amounts which Salsbury paid to Ware. After some time, Salsbury ascertained for the first time that Ware had deceived him in regard to the price paid by him for the land, that Ware had in fact paid to Ingraham only $5,040 instead of $8,640 as represented by Ware, and had paid to Thompson instead of to Wood, as Salsbury supposed, the sum of $1,600 instead of $3,840 as represented by Ware, and that Wood had taken the title from Thompson and conveyed it to Salsbury as an accommodation to Ware, for the purpose of preventing Salsbury from know-

ing what was the true price paid by Ware for the land. Ware admitted that he purchased the property for the sums alleged by Salsbury, but denied that such purchases were made for Salsbury, claiming that he made the purchases on his own account, and not as Salsbury's agent, that the lands were well worth the price paid by Salsbury, that Salsbury had re-sold the lands at a large profit; that Salsbury had never paid Ware for his services as agent, and that Ware had never presented any bill to Salsbury for his services. Salsbury brought suit to recover the difference between the prices which Ware had actually paid for the lands and the prices which he represented to Salsbury that he had paid.

Argument of Defeated Party (Ware): He had not acted as Salsbury's agent, but on his own account, and was entitled to the profits in the transaction.

Law Applied (Opinion delivered by Judge Magruder of the Supreme Ct.): Salsbury and Ware had been acquainted for a year or more prior to the time of the transaction here in question, and had occasionally conversed respecting these lands in Indiana. Ware advised Salsbury to purchase some of the land, as they would return a profit, and spoke of the Wood and Ingraham tracts, giving prices of the same. The negotiations and transactions, so far as Salsbury was concerned, were with Ware alone; and on September 13, 1890, Salsbury made a deposit with Ware and the terms of sale were agreed upon. Salsbury then furnished to Ware the money to purchase the lands in question at the prices submitted by Ware. Thereafter, by warranty deed, Ingraham conveyed the 720 acres to Salsbury. By deed on October 7, 1890, Wood conveyed to Salsbury a tract of 480 acres, and on the same day on which Wood conveyed to Salsbury, Thompson, the real owner of the 480 acres, conveyed the same by warranty-deed to Wood. Wood was a mere figure-head acting for Ware, who paid him $20 for his services in taking title. All the negotiations concerning the 480 acres were carried on between Salsbury and Ware. Salsbury did not come in contact with Ingraham, or Thompson or Wood in connection with the purchases.

It cannot be said that in making these purchases Ware acted as agent for Ingraham and Thompson, the owners of the prop-

erty. The theory that he acted as agent for the vendors is negatived by his contention that he was himself the owner of the property, and was selling it as his own property to Salsbury. If he owned the property himself or had been given options for the purchase of it by the owner, he certainly was not acting as the agent of such owners in making the sales. He never told Salsbury nor did Salsbury ever know until shortly before the present suit was brought, that Ware claimed to own the property or to be selling it as his own, or that he had, or claimed to have, any interest of any kind in it.

The evidence shows that Salsbury dealt with Ware as his agent or in such a way that a trust relationship existed between them. Ware had no right to take advantage of that relationship to make a profit for himself which properly belonged to Salsbury. The position which he occupied towards Salsbury was one of trust and confidence; and inasmuch as trust and confidence were placed in him by Salsbury, he could not take advantage thereof to the injury of Salsbury. An agent is disabled from dealing in the subject-matter of his agency on his own account. The agency being established, the agent will be compelled to transfer the benefit of his contract to his principal, even though he may swear that he purchased on his own account. It makes no difference that such agent is a mere volunteer. If he professes to act not for himself but for another he has trust and confidence placed in him. The party relied upon must meet fairly and squarely the responsibility of his position, and must not take any advantage, either to his own gain or to the injury of the person whom he represents. If a party employs an agent to make a purchase of land, he is entitled to all the skill, ability and industry of such agent to make the purchase on the best terms that can be had, and is entitled to the property at the price the agent pays. The agent cannot avail himself of any advantages his position may give him to speculate to the injury of his principal. All the profits and advantages gained in the transaction belong to the principal. The evidence fully shows that Ware acted as Salsbury's agent and used subterfuges to conceal the real prices paid for the property in question, and also in the manner in which the conveyances were made to Salsbury.

The fact that Salsbury afterwards sold the tract at a profit on the price he paid has no bearing on the controversy.

CASE No. 90.

WHITNEY *v.* MERCHANTS UNION EXPRESS COMPANY.

(1870) 104 Mass. 152; 6 Am. Rep. 207.

Facts: Whitney sued the Merchants Union Express Company to recover for the loss of a draft which he had entrusted to them. At the time he gave the draft to them he instructed them to present to Plummer & Co. and to return it to him at once if it was not paid. The Express Company's messenger presented the draft on the 14th of October and payment was refused. Instead of following instructions and returning the draft at once, the Express Company allowed Plummer and Co. time to write to Whitney for some explanation with regard to the amount of the draft. Whitney then wrote to Plummer and Co. giving the information in question, and Plummer and Co. were ready on the 16th of October to pay the full amount; but the draft was not presented again to Plummer & Co., and on October 19th they failed, and were afterwards unable to pay.

Argument of Defeated Party (Express Company): They had done all that they were bound to do when they presented the draft and caused Whitney to be notified of its non-payment.

Law Applied (Opinion delivered by Judge Colt of the Supreme Judicial Ct.): It is the first duty of an agent whose authority is limited to adhere faithfully to his instructions in all cases to which they can be properly applied. If he exceeds or violates or neglects them, he is responsible for all losses which are the natural consequences of his acts. We are of the opinion that there is evidence of neglect in this case on the part of the Express Company. They could have avoided all liability by returning the draft at once upon the refusal to pay.

Whitney is in no respect chargeable with neglect, for he had no further instructions to give with regard to the draft. The loss is wholly due to the neglect of the Express Company and must be borne by them.

CASE No. 91.

DEVALL *v.* BURBRIDGE.

(1842) 4 Watts & Sergeant, 305.

Facts: Burbridge, as Devall's agent, was operating Devall's steamboat. While he was operating the steamboat, it was seized by creditors and sold at a great sacrifice, having cost about $8,000 and being sold at a forced sale for a twentieth part of the sum. Burbridge did not notify Devall of the seizure by creditors.

Argument of Defeated Party (Burbridge): It was not his duty to give the notice in question.

Law Applied (Opinion delivered by Ch. Just. Gibson of the Supreme Ct. of Pennsylvania): It is an agent's imperative duty to give his principal timely notice of every fact or circumstance which may make it necessary for him to take measures for his security. Had notice been given in this instance, it is not to be supposed that the owner would have permitted a boat to be sacrificed in the manner in which this one was sacrificed. It is not the agent's duty to judge for others, and by omitting to apprise the plaintiff of the crisis he took on himself all but the unavoidable losses which were incident to it. Neglect of his agency is not to be excused because it had become troublesome. He had voluntarily accepted it, and if, to use his own words, "he did not want to be bothered with it," his course was to settle his accounts and to resign it, not to abandon it. Such is the rule of the common law. For breaking it the defendant is chargeable with a dereliction of duty.

CASE No. 92.

PRESCOTT *v.* WHITE.

(1885) 18 Ill. App. 322.

Facts: White sued Prescott and others to recover for services and expenses while acting as traveling salesman for the latter in the sale of a certain stove polish. Prescott introduced evidence tending to prove that White had violated positive instructions in many instances in returning to them orders from

supposed customers to be filled by them, which were not signed by such prospective customers; that he had in the course of his employment as agent been guilty of repeated acts of dishonesty, in sending in to be filled many orders which were either entirely fictitious or so unfairly obtained that the persons purporting to have given such orders refused to accept and to pay for the goods; which refusals involved Prescott in much trouble, loss and expense.

Argument of Defeated Party (White): He had fulfilled the terms of his agency, and was not bound to pay any losses sustained by reason of orders being refused by customers.

Law Applied (Opinion delivered by Judge McAllister of the Appellate Ct.): The person who bargains to render services for another is deemed in law to undertake for good faith and integrity in the performance of his duties, and is liable in damages to his employer for negligence, bad faith or dishonesty. Not only that, but the law goes further. By gross misconduct in the course of his agency or intentional frauds upon his principal, he may be held to have forfeited all rights to compensation as respecting any of the business of the principal into which said fraud or misconduct shall have entered. The evidence on the part of the defendant tended to prove gross misconduct and intentional frauds on the part of White, which resulted in trouble, loss and expense to his employers, which would have justified the jury in finding that he forfeited all right to compensation for services during the time he so misconducted himself.

CASE No. 93.

CHAMBERS *v.* SEAY.

(1882) 73 Ala. 373.

Facts: Seay was the owner of a tract of land in Talladega County, Alabama, valuable for the quantity of iron ore it was known to contain. He placed this land in the hands of Chambers for sale subject to Seay's ratification, if he, Seay, should "deem the price to be paid for said property sufficient to warrant

the sale." Chambers on his part agreed to undertake a sale of the land; and to this end undertook and promised to transport specimens of ore taken from it, to Birmingham, England, for inspection there, and also to advertise the property in papers in the cities of Birmingham and London, England. By way of compensation for his services, it was stipulated that Chambers should receive "an undivided one-fourth interest in the proceeds of sale when sold as aforesaid," and his right to sell was made "exclusive." In January, 1880, Seay revoked the agency of Chambers. Very soon afterwards he himself sold the property to another party for the sum of $20,000.

Argument of Defeated Party (Chambers): Seay had no right to revoke the agency, as it was an agency coupled with an interest.

Law Applied (Opinion delivered by Judge Somerville of the Supreme Ct.): In ordinary cases a principal who has empowered an agent to sell may at any time before the sale revoke the agent's authority. It is equally true that the usual theory of commissions is that the agent is to receive them only in event of success. Chambers claims that the agency is coupled with an interest and irrevocable; but to be irrevocable a power conferred must create an interest in the thing itself or the property which is the subject-matter of the power. The power conferred on Chambers was not of this nature. Very clearly, he had no interest in the subject-matter of his agency, the land itself. He was interested only in the money to be derived as the proceeds of the sale of the land, which could only be realized by the completion of the agency or by some negotiation which was equivalent to it. He had parted with no money or other value, for the security of which the power of sale was conferred in the agreement. He had risked in the venture of his agency only his personal services and the expense incidental to its execution. He risked the expense involved in view of the large compensation to be reaped as commission in event of a successful sale. The fact that the power of sale conferred on Chambers was stipulated to be "exclusive" does not render it irrevocable, for in case of a naked power an express declaration of irrevocability will not prevent revocation.

CASE No. 94.

DAVIS *v.* FIDELITY FIRE INSURANCE COMPANY.

(1904) 208 Ill. 375; 70 N. E. 359.

Facts: Davis and Shepard, in the spring of 1900, became the western agents of the Fidelity Fire Insurance Company, with offices in Chicago; and they acted in such capacity from May 1st to December 8th, 1900, when the western agency was discontinued, and the appointment of Davis and Shepard was terminated. The suit in question arose over a deposit held in a Chicago bank by the western agents in the name of the company. They claimed that they had an equitable lien upon such funds for damages growing out of the wrongful termination of their agency in December, 1900. There were numerous negotiations leading up to the appointment of Davis and Shepard as the western agents for such company, with one Courtney, representing the company, who later became its president. Davis and Shepard were anxious to obtain an appointment definite in its terms as to the duration of the agency. Many letters passed between the parties, and finally a lengthy letter of appointment was sent to Davis and Shepard. The only matter in said letter of appointment referring to time of duration of the agency is contained in the following quoted portion of said letter: "The Fidelity is in business to stay, and under your able representation should soon take a leading place in the agency field of the west. * * * *

"Duration of Your Appointment.

* * * * "Our aim which we understand to be shared by your good selves, is to establish a permanent insurance business in the territory assigned to you, on a solid basis, and under conservative management such as has been mutually discussed and agreed upon, and this contract is entered into between this company and your good selves with this understanding only." The letter then concludes as follows: "In conclusion we desire to express the hope that our relations will prove mutually beneficial and of long duration and of the most harmonious nature. Yours very truly,———————— President." Prior to the receipt of the appointment in question, Davis and Shepard had written to J. J. Courtney, president of the Insurance Com-

pany, in connection with their negotiations for the establishment of the agency. The following phrase was contained in their letter: "It must be the understanding that the contemplated arrangement is a permanent one extending over a period of years; not less than five nor more than ten is asked in such a contract, for which employment the said named gentlemen will give their very best endeavor and their time in the development of said department." This letter was referred to in the appointment granted. It was suggested to Davis and Shepard by the company after they had received the appointment in question that they should make whatever suggestions they desired in connection therewith, and later Davis and Shepard replied making several suggestions but making no reference whatever to the duration of the agency.

Argument of Defeated Party (Davis): Their contract of agency was not an indefinite one, but was intended to extend for a term of not less than five nor more than ten years, and that the company had no right to terminate the agency.

Law Applied (Opinion delivered by Ch. Just. Hand of the Supreme Ct.): From the view we take of the case it is necessary to consider but one question, that is, was the firm of Davis and Shepard appointed Western Agents for the Fidelity Fire Insurance Company for a period of five years, or was their appointment for an indefinite period of time and subject to termination by the insurance company upon its discontinuing its western agency. We think that all communications and negotiations prior to date of the letter of appointment were in the nature of preliminaries, and became merged in said letter of appointment when accepted. They were asked to examine the letter of appointment, and make any suggestions with reference thereto, and they failed to make any change with reference to duration of the time of their appointment. We have no doubt but that the parties intended and fully expected that the western agency of the insurance and the business relation established between them would continue for some time, perhaps for a period of years. Still the time the western agency and the business relations of the parties were to continue was left indefinite by the agreement, and the insurance company was not bound to continue its western agency, and neither party, by

the terms of the agreement, could require the other to continue the relation thereby established between them longer than such relation was agreeable to both. We are of the opinion that the letter of appointment does set forth the agreement between the parties and that its terms are plain and unambiguous. While the agreement does not state the duration of the time of the appointment of Davis and Shepard, but leaves the time of their appointment indefinite, that does not, in a legal sense, make the agreement uncertain or ambiguous. To permit parol evidence to be admitted to prove that the appointment was for a period of five years, by reason of the fact that the time of their appointment was indefinite would be to make a new contract for the parties, which the court is powerless to do.

CASE No. 95.

KROEGER *v.* PITCAIRN.

(1882) 101 Pa. St. 311; 47 Am. Rep. 718.

Facts: Kroeger was the owner of a store; and Pitcairn, agent of a fire insurance company, had written a policy of insurance covering the stock therein. Kroeger kept petroleum in his store, which he was forbidden to do by the terms of his policy, unless the written consent of the company was endorsed on the policy. Kroeger pointed out the terms of the policy to Pitcairn, who told him that no written endorsement was required because the amount of petroleum kept by Kroeger was so small that it was unnecessary to mention that fact in the policy nor to obtain the consent of the company. Pitcairn said further that no notice was ever taken of the keeping of such a small quantity of petroleum, so long as no more than a barrel was kept in the store at a time, as it was then considered as general merchandise and disregarded. Kroeger was induced by these statements of Pitcairn to accept the policy and pay the premiums. Later Kroeger's stock was destroyed by fire, and when he later sued the company to recover for his loss, he was defeated because he had kept the forbidden article without the written consent of the company, as provided by the terms of the policy. He then sued Pitcairn to recover for the misrepresentations Pitcairn had made to him.

Argument of Defeated Party (Pitcairn): The statements made to Kroeger did not constitute a contract. There was no intent on his part to bind himself by any statements made to Kroeger, and he was not bound by such statements.

Law Applied (Opinion delivered by Judge Sterrett of the Supreme Ct.): The transaction here clearly amounted to an agreement between the parties that Kroeger's stock covered in the policy should include one barrel of carbon oil as a part of the stock insured, without thereby invalidating his policy. It is impossible to regard the transaction in any other light. What was said and done by Pitcairn in the course of the transaction amounted to more than a positive assurance that the accepted meaning of the policy was as represented by him. In effect, if not in substance, his declarations were tantamount to a proposition in behalf of the company he assumed to represent that if the insurance was effected it should be with the understanding that a barrel of carbon oil was included in and formed a part of the insured stock of merchandise, without being specially mentioned in the policy. The plaintiff so regarded these declarations and relied upon them, and accepted the policy on the terms proposed, and thus concluded, as he believed, a valid contract of insurance authorizing him to keep in stock, as he had theretofore done, a small quantity of carbon oil. It was not until after the property was destroyed that he was undeceived. He then discovered that in consequence of Pitcairn's statements in excess of his authority, he was without remedy against the company. Has he any remedy against the defendant by whose unauthorized acts he was placed in this false position? He has. The defendant is personally responsible for the consequences if he assumed to act for the company and overstepped the boundary of his authority and thereby misled Kroeger to his injury, whether intentionally or not. "Whenever a party undertakes to do any act as the agent of another, if he does not possess any authority from the principal therefor, or if he exceeds the authority delegated to him, he will be personally liable to the person with whom he is dealing, for or on account of his principal."

CASE No. 96.

BROWN *v.* BRADLEE.

(1892) 156 Mass. 28; 30 N. E. 85; 32 Am. St. 430; 15 L. R. A. 509.

Facts: A reward was offered in writing, in the following terms:

"$2,500 will be paid to any person furnishing evidence that will lead to the arrest and conviction of the person who shot Mr. Edward Cunningham, November 21st, 1889.

J. WALTER BRADLEE,
C. EDWIN RUGGLES,
J. ALBERT SIMPSON,
Selectmen of Milton.

Milton, November 22, 1889."

Brown shortly afterwards furnished the proper information called for in the above offer; and sued the selectmen for the reward.

Argument of Defeated Party (Bradlee): They did not, by this offer, bind themselves, but the Town of Milton, for which they were selectmen. That the purport of the words used was not to make the signers personally liable.

Law Applied (Opinion delivered by Judge Holmes of the Supreme Ct.): The selectmen, by adding their official designation, do not take away from the names their ordinary signification as proper names and make of their collective names a composite unit which means the Town of Milton and nothing else. The purport of the words used in this case is that the promise contained in the body of the paper is made by the signers thereof, and the said signers are personally liable on their contract.

CASE No. 97.

HOBSON *v.* HASSETT.

(1888) 76 Cal. 203; 9 Am. St. 193.

Facts: Hobson brought this action to recover the amount due on a promissory note which read as follows:

"September, 7, 1881.

"$1,135. One day after date, without grace, we promise to pay A. D. Hobson or order the sum of eleven hundred and thirty-five dollars, payable only in gold coin of the government of the United States, for value received, with interest thereon in like gold coin at the rate of ten per cent. per year from date until paid.

"A. HASSETT, President."

Hassett was president of the Grangers Business Association of Healdsburg, and this corporation prior to 1878 had been indebted to Hobson in the sum of $2,000. On the date of the above note Hobson came to Hassett and requested a part payment and a new note for the balance. The part payment was made and this note was given by Hassett to Hobson. The interest on the note was paid to Hobson at the office of the corporation, and he later brought this suit against Hassett for the principal sum.

Argument of Defeated Party (Hassett): The note was the note of the corporation, and not his personal note.

Law Applied (Opinion delivered by Judge Belcher of the Supreme Ct.): There is nothing on the face of the note in question to show that there was any principal back of Hassett. He signed his own name and wholly failed to indicate that he had a principal or who or what the principal was. The word "President," which he added to his name, must therefore be regarded as merely description of the person, and he is personally liable thereon. Judge Story says, "When upon the face of the instrument the agent signs his own name only, without referring to any principal, then he will be held personally bound, although he is known to be or avowedly acts as agent."

Professor Parsons says, "If an agent make a note in his own name and add to his signature the word 'Agent,' but there is nothing on the note to indicate who is principal, the agent will be personally liable just as if the word 'Agent' were not added." In the light of these rules of law and the cases decided where similar questions have been raised, it seems to us that there can be no question but that Hassett rendered himself personally responsible for the payment of the note in question.

CASE No. 98.

HUBBARD *v.* TENBROOK.

(1889) 104 Pa. St. 291; 16 Atl. 817: 10 Am. St. 585; 2 L. R. A. 823.

Facts: Tenbrook sold and delivered a quantity of hams to one Sides who was conducting a grocery business in his own name, but with the property and as the agent of Hubbard. This suit was brought to recover the purchase price of the hams sold.

Argument of Defeated Party (Hubbard): Sides was not an agent to purchase from anyone; but was employed as salesman only without any authority whatever to act for or to bind his employer for the purchase of any goods or merchandise upon the credit of his employer.

Law Applied (Opinion delivered by Judge Mitchell, of the Supreme Ct.): We have the question presented here whether an agent may be put forward to conduct a separate business in his own name, and the principal escape liability by a secret limitation upon the agent's authority to purchase. The answer is not at all doubtful. A man conducting an apparently prosperous, profitable business obtains credit thereby, and his creditors have a right to suppose that his profits go into his assets for their protection in case of an unfavorable turn of the business. To allow an undisclosed principal to absorb the profits and then when the pinch comes to escape responsibility on the ground of orders to his agent not to buy on credit would be a plain fraud upon the public. The contention of Hubbard that those dealing with an agent are bound to look to his authority is freely conceded, but this case falls within the equally established rule that those clothing an agent with apparent authority are, as to parties dealing on the face of such authority, conclusively estopped from denying it.

CASE No. 99.

STANDARD LUMBER COMPANY *v.* BUTLER ICE COMPANY.

(1906) 76 C. C. A. 39; 146 Fed. 359; 7 L. R. A., N. S., 467.

Facts: The Standard Lumber Company erected a building for the Butler Ice Company, at a contract price of $10,808, and did some extra work amounting to $2,838, a total of $13,646. Against this sum the Standard Company allowed the Ice Company credit to the amount of $11,624 leaving a balance of $2,022.00 claimed to be due from the Ice Company to themselves. The written contract called for the price of $10,808 for the work. The evidence showed that the Standard Company, through one of its agents, had submitted a bid for $6,309.50 for the work in question to the president of the Butler Ice Company. The president of the Butler Ice Company made a secret arrangement with the Standard Company to raise the bid to $10,808, and when the amount of the contract, $10,808, was paid to the Standard Company, he was to receive $2,000 of the difference, from the Standard Company. The contract was signed by the Butler Company under its corporate seal, calling for the payment of $10,808 for the work on the original contract. The work was completed and this was a suit to recover for the balance of $2,022.

Argument of Defeated Party (Lumber Company): The Butler Ice Company was bound by the action of its president and secretary in signing the contract, under its corporate seal, and the Butler Ice Company, after the contract was so signed, could not avoid its obligations. The amount sought to be recovered is all contained within the sum due for extra work, and therefore any fraud in the original contract would not prevent the Standard Company from recovering its balance due.

Law Applied (Opinion delivered by Judge Gray of the U. S. Circ. Ct. of App.): The contract in question was not only immoral, but it was illegal and criminal, and therefore void. No court would be justified in enforcing the whole or any part of such a contract. A contract otherwise void, and being founded upon an immoral consideration, cannot be rendered valid by the mere ceremony of attaching a seal thereto. The contention of the Lumber Co. that the original contract was executed and that the balance sued for referred to the extra work cannot be seriously considered, for there was no appropriation of payments made at the time to any particular part of the contract. The Lumber Company cannot now make

that appropriation for its own benefit. The poison of the immoral consideration affects the contract as a whole, and the court will not lend its aid to the enforcement of any part thereof. Though one of the parties to the perpetration of the fraud was the president of the Ice Company, this fact will make no difference. The real defendant is the company. It was the victim, not the perpetrator of the fraud. Its president conspired with the plaintiff to take from it a large sum of money by falsehood and deception, and practiced through the medium of the contract here sued upon. But even if the defendant could by any possibility have been shown to have been a party to his own spoliation, by the dishonest conduct of its president, it could still have alleged the illegal consideration as a defense. Where the contract upon which the action is founded is contrary to good morals, or forbidden by express law, the defendant may plead its invalidity, even though he be a participator in the wrong. In such a case the courts refuse to enforce the contract on grounds of public policy, and not as a matter of private interests. The plaintiff cannot recover.

CASE No. 100.

FRADLEY *v.* HYLAND.

(1888) 37 Fed. 49; 2. L. R. A. 749.

Facts: Gibson was managing certain canal boats of his own, when he was employed by Hyland to manage certain canal boats for the latter. Gibson was to obtain employment for the boats and to return the net earnings monthly, to Hyland, after paying for all repairs and supplies and deducting his own commissions. His instructions were not to obtain supplies on credit, but if not in funds from his earnings he was to call upon Hyland for such funds. Monthly settlements of account took place between Hyland and Gibson, in which Gibson was allowed all items for supplies paid or contracted for by him, against the earnings of the boat, and a considerable fund was always left in his hands by Hyland. Gibson ceased to act as Hyland's agent September 1, 1886. Prior to this time Fradley had sold Gibson certain supplies supposing that Gibson was the owner of all the boats he was managing, and dealt with him as though he were

such owner, selling him supplies for all the boats indiscriminately, charging the price to him and taking his notes from time to time, or those of one Isham, his clerk.

Law Applied (Opinion delivered by Judge Wallace, of the U. S. Circ. Ct.): The general rule is that when goods are bought by an agent who does not at the time disclose that he is acting as agent, the seller, although he has relied solely upon the agent's credit, may, upon discovering the principal, resort to him for payment; but the rule which allows the seller to have recourse against an undisclosed principal is subject to the qualification which, as stated by Justice Bayley is, "That the principal shall not be prejudiced by being made personally liable if the justice of the case is that he should not be personally liable. If the principal has paid the agent, or if the stated accounts between the agent and the principal would make it unjust that the seller should call on the principal, the fact of payment or such stated account would be an answer to the action brought by the seller, where he has looked to the responsibility of the agent."

It is enough to absolve the principal from liability that he has in good faith paid or settled with his agent. At the time of the last settlement Hyland had paid the amount of Fradley's demands and all outstanding liabilities contracted by Gibson as between Gibson and himself, and this was before Fradley knew any principal in the purchases other than Gibson himself.

CASE No. 101.

KAYTON *v.* BARNETT.

(1889) 116 N. Y. 625.

Facts: Kayton sold goods to Bishop for $4,500, for which Bishop paid $3,000 on delivery and gave three notes aggregating $1,500. Bishop died insolvent without having paid any of the notes. Kayton sued Barnett to recover on the notes on the ground that Barnett was the real party in interest and that Bishop was acting as agent for him in making the purchase. Barnett directed every step taken by Bishop in his negotiations with Kayton; the property was purchased for and delivered to

Barnett, who ever since retained it; and Barnett paid the $3,000 towards the purchase-price, agreeing with Bishop, after Bishop delivered the notes to Kayton, to hold Bishop harmless therefrom, that is, that Barnett would pay them. Kayton had asserted that he would not sell to Barnett, but nevertheless Barnett, through the circumvention of Bishop, obtained the goods in question by purchase from Kayton. Barnett had the benefit of the transaction, but never paid the remainder of the purchase-price pursuant to the agreement.

Argument of the Defeated Party (Barnett): Bishop was not his agent.

The rule that an undisclosed principal may be held does not apply for the reason that when Bishop and Kayton were negotiating, Kayton stated that he would not sell the property to Barnett, and Bishop assured them that he was buying for himself and not for Barnett.

Law Applied (Opinion delivered by Judge Fellett of the N. Y. Ct. of App.): When goods are sold on credit to a person whom the seller believes to be the purchaser, and he afterwards learns that the buyer bought as agent for another, the vendor has a cause of action against the principal for the purchase price. The defendants concede the existence of this general rule, but assert that it was not applicable to this case, because, while Bishop and the plaintiff were negotiating, the plaintiff stated that he would not sell the property to Barnett. Bishop then assured Kayton that he was buying for himself and not for Barnett, but Bishop was directed in every step by Barnett in his negotiations with Kayton, and Barnett received the goods. There is no question but that Bishop was Barnett's agent. Bishop's mind was, in this transaction, Barnett's mind, and so the minds of the parties met, and Barnett, having, through his own and his agent's deception, acquired the property by purchase, cannot successfully assert that he is not liable for the remainder of the purchase price because he, through his agent, succeeded in inducing Kayton to do that which he did not intend to do, and perhaps would not have done had Barnett not dealt disingenuously.

CASE No. 102.

SINGER MANUFACTURING COMPANY *v.* HOLDFODT.

(1877) 86 Ill. 454; 29 Am. Rep. 43.

Facts: Holdfodt sued the Singer Company for breaking in and entering his dwelling-house and taking and carrying away a sewing-machine. The Singer Company, a New York corporation, did business through agents in the City of Chicago. It had an office called its "head office," on State Street, and an office under the control of one Wilkin, on Dearborn Street. Wilkin was to dispose of sewing-machines, to take contracts therefor, to deliver the contracts to the "head office," and to collect and to pay the money to the "head office." On July 27, 1872, Wilkin, as agent for the Singer Company, sold to Holdfodt a sewing-machine for $75, of which $10 was paid down and the balance was to be paid in monthly installments of $5 on the 27th of each month. At the said time Holdfodt signed an instrument which was also signed by Wilkin reciting that the Singer Company had leased the machine to Holdfodt for 13 months at the price and terms above stated, providing that, if default should be made in any payment, the Singer Company should have the right to declare the lease forfeited and either with or without process to enter the premises, to search for and to take and to remove the machine. Holdfodt made all the payments required by his contract as they became due, or before, and received the following receipt:

"Chicago, October 28, 1873.

Mr. F. Holdfodt, to one Singer Sewing Machine, Number 663272—$75.00.

Rec'd Payment, J. N. WILKIN, N. E. K."

The machine was delivered to Holdfodt when he made the purchase, and remained in his possession until August 18, 1874, when the agents of the Singer Company, in Holdfodt's absence, and against the remonstrances and exertions of his wife to prevent such action, entered his dwelling-house and forcibly removed the machine and carried it to the head office. In March, 1874, Holdfodt, being informed that someone professing to be the Singer Company's agent had in his absence been in his residence threatening to take the machine, went to

Wilkin's office and notified him of the threat and showed his receipts, upon which Wilkin replied: "That is all right, they will not bother you any more." The same thing happened again in May of the same year; and when Holdfodt went to Wilkin's office and showed him his receipts, he was then told: "We have nothing to do with this any more, you will have to go to 111 State Street." He then went to 111 State Street, showed his receipts, and asked if it was all right. The man there, who he supposed was the superintendent, said to him: "There is something wrong, your receipt is all right, and if that man comes around again I wish you would have him arrested." The Singer Company's agents returned the machine to Holdfodt's home the next day after it was forcibly taken as above related, after Holdfodt, however, had applied twice at the head office and once at the office of Wilkin, and they first wanted to make him return the receipts before they returned the machine, which he refused to do. When the Singer Company's agents removed the machine, the other members of Holdfodt's family who were present beside his wife, were three children, the eldest about four years old and the youngest a baby. Two disinterested witnesses testified that they had witnessed the taking of the machine from Holdfodt's home, one of them being attracted by the screams of Mrs. Holdfodt. This witness then went to Holdfodt's home and entreated the man not to take the machine until Holdfodt's return, informing him that Holdfodt had a receipt for it, but the man said that he would not, and went into the house and took the machine, and another man with him helped him to put it on a wagon and drove off with it. Mrs. Holdfodt was in delicate health, and was crying.

Argument of Defeated Party (Singer Company): They are not liable in damages for the acts of their agents because they acted honestly under a mistaken belief that the machine was not paid for, and that, as soon as convinced of their error they returned the machine in good condition. The act done was done in good faith and with prudence and proper caution; and in any event a corporation cannot be held liable in vindictive damages for an act so done.

Law Applied (Opinion delivered by Ch. Just. Scholfield of the Supreme Ct.): The Singer Company was several times noti-

fied by Holdfodt that the machine had been paid for, having been notified both through Wilkin and through the "head office," by Holdfodt in person. When thus notified common prudence and common honesty alike required the correction of the company's books in accordance with the truth, so as to avoid any future misapprehension; but whether the head office was notified or not was not of the slightest concern to Holdfodt's rights. He had nothing to do with the "head office." Wilkin was the Company's agent, with ample authority to sell the machine, and to receive and to receipt for the payment of its price. Holdfodt bought the machine from him, paid him in full to the day for it, and received his receipt. His act and his knowledge in this transaction were the act and the knowledge of the Singer Company, and the least that can be said of the Company's subsequently taking the machine by force from Holdfodt's residence is that it resulted from its gross negligence. When Holdfodt made the last payment for his machine, all pretense of a license to enter his residence and take the machine was ended. Thenceforth it was as secure against the Company's seizure as any other property Holdfodt owned. We think, under the law and the evidence, the case is one eminently proper for the imposition of exemplary damages. Under the law it is settled that if the wrongful act of an agent is perpetrated while ostensibly discharging duties within the scope of corporate purposes, the corporation may be liable to vindictive damages, and that a person openly and notoriously exercising the functions of a particular agency of a corporation will be presumed to have sufficient authority from the corporation so to act.

CASE No. 103.

BAIRD *v.* SHIPMAN, *Administrator.*

(1890) 132 Ill. 16; 23 N. E. 384; 7 L. R. A. 128; 22 Am. St. 504.

Facts: Baird was the agent for renting premises on Michigan Avenue, in Chicago, belonging to Goodman, a resident of Hartford, Connecticut. Baird had complete control of the premises, with the residence and the barn thereon, repairing the same in his discretion, and there was no proof that in such

matters he received any directions from the owner. A lease of the premises was made to Emma R. Wheeler, from May 1, 1885, to April 30, 1886. At the time the lease was made, the large carriage door to the barn was in a very insecure condition, and Baird through one Warner, the manager of the renting department, orally agreed with Mrs. Wheeler to put the premises in thorough repair. Nothing was done, however, to improve the condition of the door; and, on June 12, 1885, while an expressman was engaged in delivering a load of kindling in the barn for one of the parties living in the house, the door, weighing about 400 pounds, fell from its fastenings and injured him to such an extent that he died the next day. Suit was brought by Shipman, as administrator of the decedent, to recover damages for the injuries which resulted in death.

Argument of Defeated Party (Baird): He was agent of the owner, Goodman, and liable to him only for any negligence attributable to them, and that his principal alone was liable to third persons.

Law Applied (Opinion delivered by Judge Garnett of the App. Ct. of Ill., and concurred in by the Supreme Ct.): Baird remained in control of the premises in question until the door fell upon the deceased. He had the same control of the premises in question as the owner would have had if the owner had resided in Chicago and attended to the leasing and repairing. There was no interruption in the causal relation between Baird and the injured man. Baird was, in fact, for the time being, substituted in the place of the owner, so far as the control and management of the property were concerned. He was notified of the dangerous condition of the door in question, and it was his duty to take steps to prevent persons being exposed to danger in entering the barn while the same was being used for its ordinary and appropriate uses. An agent cannot find shelter behind his principal in all cases. If, in the course of his agency, he is entrusted with the operation of a dangerous machine, to guard himself from personal liability he must use proper care in management and supervision, so that others in the use of ordinary care will not suffer in life, limb or property. It is not his contract with the principal which exposes him or protects him from liability to third persons but his common law obliga-

tion so to use that which he controls as not to injure another. That obligation is neither increased or diminished by his entrance upon the duties of agent, nor can its breach be excused by the plea that his principal is chargeable.

CASE No. 104.

INSURANCE COMPANY *v.* KIGER.

(1880) 103 U. S. 352.

Facts: Kiger, on March 19, 1877, consigned to Aiken and Watt, his factors at New Orleans, 196 bales of cotton; and at the time of consignment instructed them not to sell the same, but to hold for further directions from him, and for better prices. On March 21st, the cotton arrived at New Orleans, and Aiken and Watt stored the same in the cotton-press of Samuel Boyd and Co. Aiken and Watt were possessed of no interest whatever in the cotton, and Kiger was not indebted to them, but on the contrary they were indebted to Kiger. On March 26, Aiken and Watt made a loan from the Mechanics & Traders Insurance Company in the sum of $4,500 for which they gave their notes to the Company secured by a receipt of Boyd & Co. to Aiken and Watt for 100 bales of Kiger's cotton, which Aiken and Watt had stored with Boyd & Co. Again, on April 3rd, Aiken and Watt borrowed an additional $2,500 from the Company, giving a similar receipt from Boyd & Co. for the remaining 96 bales of cotton belonging to Kiger. Prior to the maturity of the notes in question, Aiken and Watt failed in business. The notes were protested for non-payment when they became due, and Aiken and Watt were adjudicated bankrupts. In April, 1877, Kiger brought suit against Boyd & Co. to recover possession of his cotton. The Insurance Company was called into the suit by Boyd & Co. and Kiger made the Company a defendant.

Argument of Defeated Party (Insurance Co.): The transaction was an absolute transfer to them of title to the cotton, and therefore they were entitled to it.

Law Applied (Opinion delivered by Ch. Just. Waite of the U. S. Supreme Ct.): The transaction between the parties was certainly not a sale, but the receipts were delivered into posses-

sion of the Company to be held as security for the payment of the notes given for the money borrowed. Undoubtedly the possession of the receipts was equivalent to the possession of the property, but the title which the Company acquired was such as grew out of its contract with the factors. That clearly was a pledge and nothing more. There was first the cotton, second, the debt for the money borrowed, and third, the delivery of the property into possession of the creditor to be held as security for the debt. These are all the elements of a pledge, and fix the rights of the parties. Aiken and Watt were the pledgors; but as they were only factors and had no interest in the property as against Kiger, the owner, their pledge was wrongful and invalid as to him. The pledge was by a factor, of the property of his principal, in which he had no interest whatever, as security for his own debt.

CASE No. 105.

PLANT *v.* THOMPSON.

(1889) 42 Kans. 664; 16 Am. St. Rep. 512.

Facts: Plant and his wife had placed certain real estate in the hands of Thompson and Miller for sale. Thompson and Miller directed the attention of their client to one Kellam, a possible purchaser of the premises. Thompson and Miller entered into no further negotiations with Kellam, but Mrs. Plant later sold the premises in question to Kellam although for a less price than was given to the agents for sale. Mrs. Plant testified that her attention was first called to Kellam as a possible purchaser by Thompson and Miller, and in connection with the sale for a less price than that given by the agent, Mrs. Plant testified: "I thought that if I could make the sale myself I could sell it cheaper and would not have to pay commissions."

Argument of Defeated Party (Plant): The brokers had not concluded the sale. It was concluded without any aid from them, and the property was sold for a less sum than that named to them.

Law Applied (Opinion delivered by Judge Holt of the Supreme Ct.): Thompson and Miller introduced the purchaser to the seller, and by that means the sale was made. The brokers

were the procuring cause of the sale through the means of bringing the buyer and the owner together, and the sale resulted as a consequence; hence the brokers are entitled to recover their commissions. When one is employed to sell real estate, and produces a person who ultimately becomes a purchaser, the broker is entitled to his commissions, regardless of the fact that the sale may have been effected by the owner of the property. It is immaterial in a case of this kind that the owner sold the property and concluded the bargain. The claim of Thompson and Miller is not affected because Mrs. Plant saw fit to sell the land for a less price than the Plants gave it to Thompson and Miller to sell for. The Plants will not be permitted to take advantage of their introduction to Kellam by Thompson and Miller, and reap the benefits of the sale made to Kellam in consequence of such introduction, and then escape all liability of paying Thompson and Miller their commissions. The fact that the Plants sold the land for a sum less than the price given their agents is immaterial for the reduction was made of their own accord.

Students desiring to read a larger treatise devoted to Agency are referred to Story on Agency (ninth edition), Mechem on Agency (second edition) or Tiffany on Agency.

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PARTNERSHIP.

WALTON SERIES.

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CHAPTER I.

DEFINITION AND CREATION OF RELATION.

1. Partnership Defined.
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11. Sharing Profits and Losses.
12. Partnerships as to Third Persons.

PARTNERSHIP DEFINED.

1. Partnership is a legal relation resulting from the voluntary association of two or more competent persons as principals, for the purpose of carrying on a business together and dividing its profits.

A partnership is sometimes referred to as a contract, but strictly speaking it is a legal relation resulting from a contract. The persons forming the relation are known as partners or co-partners; who, taken collectively, are sometimes called the "firm."

There is a slight distinction between "partners" and "co-partners," the prefix "co" meaning together. Thus *A* and *B* being members of one partnership and *C* and *D* members of another firm, it might be properly said that *A* and *C* are partners, though not with each other; but *A* and *B* are co-partners, that is, partners together.

Strange as it may seem, one of the most difficult questions in the study of the law of partnership is the determination of what actually constitutes a partnership. Many definitions have been given; though some well known writers, recognized as authorities on the subject, have refused to attempt one, owing to the lack of harmony as to the tests for determining the existence of the relation.

THE CONTRACT OF PARTNERSHIP.

2. The partnership relation is founded upon a contract, having for its object the sharing of profits.

The contract of partnership must contain all of the essential elements of an ordinary contract, namely:

Competent parties.
Voluntary agreement.
Legality of object and subject matter.
Consideration.

A formal written contract of partnership is known as articles of co-partnership, and should indicate:

The names and addresses of the partners.
The nature and location of the business.
The commencement and duration of the partnership.
The contributions of each partner.
The rights and duties of each partner.
How profits and losses should be borne.
The disposition of assets on dissolution.

Articles of co-partnership are construed as any other contract.

Articles of co-partnership may be changed impliedly by subsequent contract of the partners.

As between the parties themselves, a partnership can result only from an express or an implied agreement. Without a contract a partnership is not created. An example will illustrate. *A*, the father of four sons, *B*, *C*, *D*

and *E*, was operating a chair factory. As soon as the boys were old enough, he put them to work in the factory. As each son arrived at his majority he continued to work for his father without a regular salary. The funds which they drew from the business for their support were charged to each one separately, and they never received a credit for labor or services. The father occasionally admitted to third persons that the sons had an interest in the business, but at no time did he consider the formation of a partnership, although often requested so to do. In a suit by one of the sons for a dissolution and an accounting the court held that there was no partnership inasmuch as there was no agreement.

If the contract between the partners is an express contract, it is usually drawn up in written form and called "articles of co-partnership." If the partnership is to continue for more than one year from the time of the agreement, under the Statute of Frauds the agreement would not be enforceable unless in writing and signed by the party to be charged. But if the contract is silent as to the duration of the partnership, or if the contract is for a term of years and express provision is made for dissolution at any time during the term by consent of the parties, the statute does not apply. (See Appendix B, Case No. 106.)

The articles of co-partnership usually contain a detailed statement of the names of the partners and the firm, the character of the business and the place of transacting such business, the contributions of the partners, the rights, duties, powers and liabilities of each partner, the division of profits and losses, the commencement, duration and termination of the relation, and a provision for distribution of assets on dissolution. A form of partnership articles will be found in Appendix A.

In the interpretation of the partnership articles, the rules of construction are substantially the same as those relating to other contracts. The intention of the parties, as shown by their language or subsequent conduct, will be ascertained and usually followed. However, there are cases where such a construction might defeat the object or purpose for which the partnership was formed and if a provision in the partnership contract is susceptible of two constructions, one of which would defeat or hinder while the other would promote the object or purpose of the firm, the latter construction is preferred.

If the usual powers of a partner are restricted by agreement, such restrictions, however strict, may be waived or altered by subsequent agreements or acts of the partners. Very frequently one partner is designated to sign all negotiable paper of the firm. The practice continues for some time, usually until the absence or disability of the authorized partner. During such absence or disability an unauthorized partner signs the firm name to bills and notes. When the disability is removed the practice still continues. The firm soon slides into the habit of permitting any partner to sign firm paper without special authority. Finally, the firm name is signed to a negotiable instrument by a partner whose authority is expressly restricted by the articles of co-partnership. The remaining partners desire to escape liability on the theory that the acting partner had no authority to sign negotiable paper. In such a case the articles of co-partnership would be deemed to have been altered by a subsequent agreement implied from the acts of the partners.

The essential elements of a contract of partnership will be considered in the order named.

COMPETENT PARTIES.

3. The rule as to the capacity of infants, insane persons, drunkards and aliens is substantially the same as in other contracts.

At common law a married woman's agreement of partnership was utterly void; but by statute in most states her disability in this respect has been either partially or entirely removed.

Corporations have no implied power to enter into a partnership.

A partnership contract of an infant is voidable at the option of the infant. He may disaffirm his contract of partnership and all partnership transactions. If he does so, he cannot be held personally liable for any of the firm debts, but his co-partners have the right to have the assets of the firm, including the property already invested by the minor, applied to the payment of the firm debts. After becoming of age he may ratify his contracts and thereby become liable for obligations assumed during his minority.

A partnership contract of an insane person is generally voidable. However, if the party dealing with the insane person is ignorant of the insanity, and acts fairly and in absolute good faith, the contract will not be set aside unless the parties can be placed in their original positions.

If a person making a contract of partnership is so intoxicated as to be incapable of comprehending the effect of his act, the contract is voidable.

Aliens who are subjects of a nation which is at peace with this country may enter into valid partnership contracts; but a resident of a hostile country cannot make a valid contract with a subject of this country.

At common law with a few exceptions the agreements of married women were void. In most states, however,

statutes have been passed giving her practically the same right to contract as a married man. As a general rule, under such statutes, she may enter into contracts of partnership with any person but her own husband. At common law she could not be a partner with her husband, and in many states this disability not having been removed by statute still remains. The capacity of married women to contract is largely regulated by statute, and the legislative enactments may differ very substantially from the general rule.

In Illinois, for example, it has been held that a husband and wife may enter into a partnership with each other, and the statute provides that a wife cannot enter into or carry on any partnership business without the consent of her husband, unless he has abandoned or deserted her, or is idiotic or insane, or is confined in the penitentiary.

A corporation has no powers except those which are expressly given in its charter or necessarily implied. A corporation generally has no implied power to enter into a partnership. Such authority must be expressly conferred either by statute or by the articles of incorporation.

AGREEMENT.

4. The partnership relation is the result of a voluntary agreement, which is not enforceable unless the consent of the parties is genuine.

In a contract of partnership, as in all contracts, there must be a true meeting of the minds of the contracting parties. If there is a mutual mistake of a material fact, then the law says that a contract never existed. A fraud practiced upon one of the contracting parties will usually render the contract voidable at the option of the party defrauded. If the fraud is in the execution of the instrument,

the courts will hold that a contract never existed. Thus, if an illiterate person is induced to sign a partnership agreement on the representation that it is an application for employment, the so-called agreement is void from the beginning. If a contract of partnership is procured through undue influence or duress, it is voidable at the option of the party over whom such influence has been exercised.

The partnership relation is purely personal. In the creation of an ordinary partnership each party to the agreement has the right to say who shall be his co-partners. Inasmuch as the relation is founded upon a voluntary contract, one cannot be made a partner against his own will, nor can one partner introduce a third person into the firm without the consent of the others. This principle is called *delectus personarum* (Latin, choice of persons), and it is one of the fundamental principles of partnership law.

There are a few exceptions to the rule of *delectus personarum*. In mining partnerships and in joint stock companies there is no choice of persons. These associations are special forms of partnerships and their characteristics will be considered later.

LEGAL SUBJECT MATTER AND PURPOSE.

5. A partnership may be formed for the transaction of any lawful business in a legal manner.

If a partnership is formed for the transaction of an illegal business, or for the purpose of carrying on a lawful business in an illegal manner, the courts will not recognize its existence. Partnerships formed for the purpose of carrying on gambling and smuggling are illegal. A partnership of contractors organized to prevent competition between bidders on a public contract is illegal because it is contrary to public policy. In the latter case the business is

lawful, but the manner of transacting the business is unlawful.

The courts will not assist a member of an illegal partnership in an action against his co-partners for a settlement or an accounting. The law usually leaves the members where it finds them, refusing to give assistance to either party.

CONSIDERATION.

6. The mutual covenants, promises and contributions of the co-partners usually constitute the consideration for the contract.

In the ordinary contract of partnership each partner agrees to contribute capital, labor or credit and to assume the duties and liabilities of a partner in consideration of similar promises by his co-partners. The equality of contributions is not material, for inadequacy of consideration is not material in the absence of fraud. However, if one party makes all of the contributions and assumes all of the duties and liabilities under an agreement that the other party shall receive an interest in the profits of the business, then no contract exists because a consideration is lacking. But if the latter takes an active part in the partnership business, thereby assuming the liability of a partner, the assumption of liability is sufficient consideration for the partnership contract. (See Appendix B, Case No. 107.)

SHARING PROFITS.

7. A contract of partnership must be for the sharing of profits.

It is a well settled rule of law that a partnership agreement must be for the sharing of profits. While it is true

that many concerns never make any profits, such a result is not contemplated at the time of the creation of the partnership. An association not for profit is not, in law, a partnership; such as an organization created merely for social, charitable or religious purposes.

Thus, where a number of persons form an association for religious purposes, the members combining their money and living in a community as one family, having everything in common, the association is not a partnership for the reason that it was not organized for profit.

TESTS OF PARTNERSHIP.

8. The determination of the existence of a partnership depends upon the intention of the parties, as expressed in their contract, or as determined by their conduct.

The rights, duties and liabilities of partners among themselves differ very substantially from the rights, duties and liabilities of the members of an association which is not a partnership. For that reason the question of the existence of a partnership frequently arises. In the determination of that question the courts will always look to the legal intention of the parties. The true intention can only be ascertained by an examination of the contract of the parties and a review of their acts in the conduct of their business.

If from an inspection of a written contract it appears that the parties clearly intended to form a partnership, it is safe to say that as a general rule the relation exists; but the rule is not without its exceptions. If one of the necessary elements of a partnership is lacking, then the relation has not been created. If, in the example of the religious association, the members had designated their express contract as "articles of co-partnership," a partnership would

not have been created thereby, because the association was not in business for profit. Or if two persons sign articles of co-partnership for the conduct of a gambling business, a partnership would not thereby be created because the object of the concern is unlawful.

On the other hand, if two persons combine their property and labor and carry on a business enterprise together as co-owners, dividing the profits between them, they will be considered partners because of their intention as expressed by their acts.

Thus, Bradley and Carroll go into the grocery business together under the firm name of Bradley and Carroll. Bradley is a groceryman of experience and Carroll supplies the money for the enterprise. Nothing has been said about a partnership. The business proves to be a success, profits are made, and from time to time Bradley and Carroll divide the profits equally. A partnership has been formed, not by any express agreement or articles of co-partnership, but by an implied agreement resulting from their acts. The intention of the parties to form a partnership has been clearly shown by their conduct.

In the determination of the intention of the parties, as expressed by their acts or contracts, certain tests are sometimes necessary. These tests will be considered.

SHARING PROFITS ONLY.

9. **Sharing profits of a business give rise to the presumption that a partnership exists between the participants; but a contrary intention may be shown by other facts and circumstances.**

If the parties have agreed to share the profits, and nothing has been said about losses, ordinarily the failure to mention losses will not change their relation.

It very frequently happens that prospective partners, confident of their success, draw up elaborate agreements as to the division of profits, but entirely overlook the question of losses. Where the omission is a mere oversight, the law will supply what is lacking. As a general rule one who shares the profits of a business as a principal or co-owner must, for that reason, share the losses if they occur. But it is not unusual for one to share in the profits of a business even though he is not a principal or co-owner. Every employee is indirectly sharing in the profits of the business in which he is engaged, yet he is not a partner. A salesman working on a commission basis is likewise sharing in the profits of his employer, but he is not thereby a partner. The employee and the salesman are not partners for the reason that they are mere agents with limited authority and do not own an interest in the business. Among the members of a partnership, however, a mutual agency exists, each partner being the agent for the others, and having the authority to bind the firm in practically any ordinary partnership transaction. Each partner has a common interest in the business of the firm, and the individual rights, property interests and powers of the members are all combined in a common business enterprise. In a large majority of the cases the members of the firm are co-owners of the business. It is this relation of mutual agency, community of interest and usual co-ownership which enables the courts to distinguish between a true partnership and other relations such as that of principal and agent and master and servant. (See Appendix B, Case No. 108.)

As a general rule a partnership cannot exist for the purpose of performing a single transaction. However, if it can be clearly shown that the partners contributed to a common fund to carry out a single enterprise as principals for profit, it is possible for such a partnership to exist.

A contract giving an agent or a servant a share in the profits of a business is not a partnership contract for the reason that there is no community of interest in the capital and the agent is not a principal.

A contract for the sharing of gross receipts as a general rule evidences an intention not to conduct a partnership for the reason that the division of losses is not contemplated. However, if the actions of the parties clearly show an intention to carry on a common business as principals for profit, they will be considered partners.

Thus, if *A*, the owner of a theater, should enter into a contract with *B* whereby *A* was to furnish the use of his theater and *B* was to have sole charge of conducting it, the gross receipts to be equally divided between them, this would not make *A* and *B* partners. It is more in the nature of the renting of the theater building by *B*. It might so happen that one-half of the gross receipts would more than cover the expense of *A* in taxes, repairs, etc., while the one-half of the gross receipts which *B* would receive might not reimburse him for his outlay in hiring performers, advertising, etc. Thus *A* would make a profit and *B* would not, so there would not be any division of profits; or the position of the two parties might be reversed. *B* might make money and *A* might lose. Partnership involves the division of profits.

SHARING LOSSES ONLY.

10. An agreement between business associates that they shall share the losses of a business, but not the profits, usually indicates an intention not to be partners.

Inasmuch as communion of profit is one of the essential elements of every partnership contract, it follows that an

agreement merely to share losses will not create a partnership. Agreements of this character quite frequently occur among railroad companies operating connecting lines.

Thus, an arrangement is made between three different railroads operating connecting lines, that each road shall carry the cars of the other roads across its line at an agreed rate, with the provision that should a loss occur which could not be located on any particular line, the loss should be borne proportionately by the roads which carried the freight. Such an arrangement does not constitute a partnership for the primary reason that there is no communion of profits.

SHARING PROFITS AND LOSSES.

11. An agreement to share both profits and losses does not necessarily create a partnership; but it is strong evidence of an intention to become partners.

If two or more competent persons agree to unite their capital or labor in the conduct of a business in which they have a community of interest, agreeing as principal proprietors to share the profits and losses, they have thereby created an ordinary partnership containing all of the necessary elements of the relation. In such a case there is little chance for a member of the firm to dispute the fact that he is a partner. The difficulty arises where one of the elements appears to be lacking, or where it is necessary to determine the existence or non-existence of that element after a review of conflicting statements. If, for example, two persons having separate causes of action against a village agree to pool their interests to conduct a joint litigation, sharing the profits and expenses between them, they will not be considered partners because there is no community of interest and because association in a single transaction does not generally constitute a partnership.

So it may be said that the sharing of profits and losses is merely an element of partnership, which, when standing alone, will not create the relation; but when combined with the principal ownership of the business from which the profits or losses arise, the relation of partnership is generally present. (See Appendix B, Case No. 109.)

PARTNERSHIPS AS TO THIRD PERSONS.

12. At the present time there is no substantial difference between partnerships as to third persons and partnerships as between the partners.

However, one may subject himself to the liability of a partner by holding himself out as one. This is known as partnership by estoppel.

Formerly it was a settled rule of law that all persons who shared in the profits of a business subjected themselves to a liability of partners in that business, even though no partnership actually existed, or was intended by the parties. The reason for the rule as given was that "if one takes part of the profit, he takes a part of that fund on which the creditor of the trader relies for his payment." Under this rule it was not considered necessary for the members to have a common interest in the business as principals; if they shared profits as profits they were held to be liable as partners to third persons. However, the injustice of such a doctrine soon became apparent, and the theory was repudiated by a decision which based the liability of partners to third persons upon the ground of mutual agency. (See Appendix B, Case No. 110.) Since the overruling of the "sharing of profits" theory, there has been no fundamental difference in the tests applied to determine partnerships in actions between the partners themselves and partnerships in actions between the partners and third persons.

It not infrequently happens that one who is not actually a partner subjects himself to liability as a partner by his conduct. When persons hold themselves out as partners in a particular business, so as to induce third persons to deal with them in that capacity, they will be liable to such persons as partners, even though a true partnership never existed. This principle is the same as the one applied in the law of Agency,—that where a person induces people to act upon the faith of his representations that he is a principal, he will be liable as such for acts of his alleged agent. So if Brown permits his name to be used in firm style, as Brown and Jones, grocers, he represents that he is a partner, and he will be liable as such to creditors of the firm. His liability is based upon the principle of estoppel, that principle of law which prevents a man who has knowingly misrepresented a fact to others who have relied thereon, from later repudiating his acts or words. In order to create a liability by estoppel, it is necessary to show: first, that the party sought to be charged held himself out as a partner, or knowingly permitted others to hold himself out as such; and second, that those seeking to hold him as a partner have relied upon such statements or acts and have been misled thereby.

Thus, *A*, conducting a general merchandise business, places *B*'s name on the letter-heads of the firm without *B*'s knowledge. As soon as *B* discovers the fact, he orders his name removed immediately. A creditor sues *B* as a partner. *B* is not liable for the reason that he did not knowingly permit *A* to hold him out as a partner.

A's name is signed to a partnership agreement by another without *A*'s knowledge. Upon discovery of the fact *A* immediately withdraws his name, but some of the letter-heads and circulars bearing his name were used thereafter. The question as to *A*'s knowledge of the subsequent use of the letter-heads is a disputed question of fact. *B* deals with the

firm without knowledge of the use of *A*'s name, but later he sues *A* as a partner. *A* is not liable as a partner as *B* did not know of the use of *A*'s name, and consequently could not have relied upon that fact or have been misled by it.

CHAPTER II.

CLASSIFICATION OF PARTNERS AND PARTNERSHIPS.

13. Kinds of Partners.
14. Kinds of Partnerships.
15. Limited Partnerships.
16. Mining Partnerships.
17. Difference Between a Partnership and a Corporation.

KINDS OF PARTNERS.

13. The members of an ordinary partnership may be classified as (1) active or silent; (2) ostensible or secret; and (3) dormant.

A partner participating in the management of the partnership business is called an active partner; one not so participating is called a silent partner.

A partner whose connection with the partnership is known is called an ostensible partner. If his connection with the firm is not known, he is a secret partner.

A member of the firm who is both silent and secret is frequently called a dormant partner.

An example will serve to illustrate the various kinds of partners. *A, B, C* and *D* form a partnership under the name of *A* and *B*. *A* participates in the management of the business, *B* takes no active part; *C* takes an active part, but his connection with the firm is not revealed, and *D* takes no active part and his connection with the firm is not known. *A* is an active partner, *B* an ostensible or public partner, *C* a secret partner and *D* a dormant partner.

A partner withdrawing from the firm is known as a retiring, outgoing or withdrawing partner; one joining the firm is an incoming partner. When a change in membership takes place the partners remaining in the firm are known as continuing partners. Upon the death of a partner the members remaining are called surviving partners.

One who is not a partner at all may, from his words or acts, lead third persons to believe that he is a partner, and if they act upon that belief to their injury, he is liable to them as a partner under the theory of estoppel. If, though not a partner, he has permitted the firm to use his name as one of the partners, he is called a nominal partner and may be liable as a partner by estoppel.

KINDS OF PARTNERSHIPS.

14. Ordinary partnerships may be divided into (1) universal, (2) general, and (3) special or particular partnerships.

A universal partnership is one in which all of the property of the parties is combined, and all profits of every kind are for their joint benefit.

A general partnership is one formed for the purpose of conducting a general business of one or more kinds, usually to continue for some time.

A special or particular partnership is one where parties have united property to share the benefit of a single transaction or enterprise.

Universal and special or particular partnerships are seldom to be found. The general partnership is the usual form of the ordinary partnership.

Partnerships are also classified with respect to the character of business which is being conducted. If the business of the firm is that of buying and selling, it is known as a

trading partnership, but if formed for some other purpose, such as the practice of law, or farming, it is a non-trading partnership.

A partnership for an indefinite term is called a partnership at will, and it can be terminated without liability by any partner at any time. A partnership for a definite term becomes a partnership at will after the expiration of that term, if the partners continue the business without a new agreement.

A joint stock company is a special form of partnership usually created by statute; but in the absence of such a statute a joint stock company is merely a partnership with transferable shares. The members agree in advance to give control of the business to a board of managers and there is no implied power in the other members to act for the concern. The death of a member will not cause a dissolution of the firm. The person succeeding to the interest of the deceased member is merely admitted to membership. The relation is not a personal one, as in the ordinary partnership, and the rule of *delectus personarum* (choice of persons) is not applicable. The shares are usually represented by certificates similar to the stock certificates of a corporation. Joint stock companies are often formed by farmers for conducting creameries; and they are sometimes found in cities in the form of co-operative stores.

A sub-partnership is created when a partner contracts with a third person on his own account, agreeing to share with that person the profits and losses of the firm. The third person is called a sub-partner. The sub-partner is not a member of the original firm, but is only a partner of the one with whom he contracted.

Thus, *A* and *B* enter into contract of partnership whereby *A* is to contribute $1,000 as his share of the capital. *A* not having $1,000 enters into agreement with *X* whereby *X* is to

advance this $1,000 for *A* and is to receive one-half of *A*'s share of the profits from the partnership between *A* and *B*. The partnership between *A* and *X* would be designated as a "sub-partnership." *X* would not have any rights or liabilities so far as the partnership between *A* and *B* is concerned but merely has a right to one-half of *A*'s profits if he receives any.

LIMITED PARTNERSHIPS.

15. A limited partnership is one authorized by statute, wherein one or more members, known as general partners, manage the business and are liable as ordinary partners, while the others, known as special partners, contribute a given amount of capital but do not assume any liability beyond their contributions.

In an ordinary partnership each partner is personally liable for all of the firm debts. In order to avoid that unlimited liability of all of the partners, statutes have been passed in most states authorizing the formation of limited partnerships. Such associations are created by statute and in no other way, as the English common law did not recognize this species of partnership.

The statutes authorizing the creation of limited partnerships are by no means uniform, but the essential requirements are substantially the same. The foundation of the organization is ordinarily a certificate, the requirements of which are prescribed by the local statute. The certificate usually contains the name of the proposed partnership and its principal place of business; the names of all the general and special partners and the residences of each; the amount of capital which each special partner has contributed; the general character of the business to be conducted; and the time at which the partnership is to commence and terminate. The certificate is acknowledged before some specified officer,

published for a definite period named in the local newspaper, and then recorded in a designated public office. The firm name usually contains only the names of the general partners. Some statutes provide that the word "limited" shall be added to the firm name.

The firm business is transacted by the general partners exclusively; and if a special partner takes an active part in the management of the business, he will become liable as a general partner. Owing to the fact that a limited partnership is purely statutory and in contravention of the common law, the statutory provisions are strictly construed. If, in the formation of the partnership or the management of its business a substantial violation of the statute has occurred, it usually subjects the special partners to an unlimited liability as general partners. (See Appendix B, Case No. 111.)

The dissolution of limited partnerships is ordinarily provided for by statute and in such cases the statute must be followed strictly.

MINING PARTNERSHIPS.

16. A mining partnership exists when two or more persons, as co-owners of a mine, operate it together and divide the profits in proportion to their respective interests.

A mining partnership differs from an ordinary partnership in several ways. No contract is necessary to create the relation, and there is no *delectus personarum* (choice of persons), so that when one member of the firm dies his interest passes to his legal successors without a dissolution of the partnership. It is a non-trading partnership and the powers of the members to bind the firm are more limited than in the case of a commercial or trading partnership.

The rights and liabilities of the partners are essentially the same as they are in the ordinary partnership. The reason why a mining partnership is governed by rules somewhat different from those applying to an ordinary partnership is because its chief, and frequently its only, asset is real estate, thus causing the courts to regard the partners more as owners of real estate than as conducting a business, and to apply rules governing co-owners of land.

DIFFERENCE BETWEEN A PARTNERSHIP AND A CORPORATION.

17. A corporation is created by the state; a partnership is formed by a private contract among individuals.

A corporation is an entity distinct from its stockholders; and it is viewed in law as a "person"; a partnership is always regarded by law as a collection of individuals.

Corporate contracts are made in the corporate name by the corporation itself and not by its stockholders; partnership contracts are with all of the partners jointly, usually designated as doing business under the partnership name.

The stockholders of a corporation have no implied authority to bind it; each partner has apparent authority to bind the other members of the firm in ordinary partnership transactions.

Suits are brought by or against a corporation in its own name and not by or against the stockholders; suits by or against a partnership are brought by or against all of the partners jointly as individuals.

A stockholder can transfer his stock in a corporation at any time, the transferee at once succeeding to the rights of the transferror; and the death of a stockholder does not affect the corporation; the

transfer of a partner's interest or the death of a partner causes instant dissolution of the partnership.

A stockholder is usually liable for the unpaid portion of his stock and no more; in an ordinary partnership a partner is individually liable for all of the firm debts.

A corporation is created by act of the state and not by the act of the individual members thereof. The state laws prescribe the method of formation of corporations and after the statutory requirements have been fully complied with, the proper state officer issues a certificate of incorporation. A partnership, as has been said, can result only from a private contract among individuals and the state is in no way concerned.

A corporation is regarded by the law as an artificial, invisible and intangible person which is entirely separate and distinct from its stockholders. The identity of the stockholders is immaterial. They are merely owners of shares of stock which represent certain rights and liabilities. If they transfer their stock to others the corporation itself will remain unchanged. But in a partnership it is different. The law looks upon a partnership as a collection of individuals and the partnership is merely a relation existing between those individuals.

Thus, if *A* desires to start a suit against the Erie Polyscope Company the title of that suit would be "*A v.* Erie Polyscope Company, a corporation," but if *A* desires to start a suit against Rich and Co., a partnership formed by Messrs. Rich and Hurley, the title of the suit would be "*A v.* B. A. Rich and John D. Hurley, doing business as Rich and Co."

A corporation, like a partnership, acts through its agents, but stockholders have no implied authority to bind the corporation merely because they happen to be stockholders. In

a partnership each member usually has authority to bind the firm on any contract within the scope of the partnership. This rule is subject to several exceptions, which will be considered in a subsequent chapter.

In a corporation a transfer of stock in no way affects the existence of the corporation; but in a partnership the death of one of the members causes a dissolution of the firm. Because of the personal character of the relation, the surviving members are not obliged to continue the business as partners with the heirs at law or successors of the deceased partner.

The liability of the stockholders in a corporation is regulated by statute. In most states a stockholder is liable for only the unpaid portion of his stock. Thus, if *A,* a stockholder in the A B Company, a corporation, is the owner of $1,000 worth of stock, $800 of which has already been paid to the company, he will be liable to creditors of the company not to exceed the sum of $200 in the event of the insolvency of the company; but if *B* is a partner in the firm of A & Co., an insolvent concern, and its liabilities exceed its assets to the extent of $4,000, *B* will be liable to creditors of the firm for the entire amount of $4,000.

CHAPTER III.

THE FIRM NAME AND PROPERTY.

18. The Firm Name.
19. The Good-Will.
20. The Firm Capital.
21. The Firm Property.
22. Personal Property.
23. Real Estate.

THE FIRM NAME.

18. The firm name is a means of identifying the partnership. It is customary, but not absolutely necessary.

In the formation of a partnership the members thereof usually adopt a partnership or firm name or style. Inasmuch as the law looks upon a partnership as a collection of individuals, there is no legal necessity for a firm name; but the practical advantages of having a firm name are so numerous that a partnership without a name is most unusual. The firm style may be a combination of the names of all the members; it may contain the names of only a part of the members, or even be the name of one member only, or it may be purely fanciful. After a name has been adopted it should be used in all partnership transactions.

Partners may and often do change the firm name, but the change will not affect the rights and liabilities of the partners. If no name has been selected, one member of the firm authorized to sign contracts may bind the other members by the use of a firm name selected by himself (See Appendix B, Case No. 112), or by signing the names of all of the partners.

Upon the organization of a partnership the members have an absolute right to the use of their names honestly as a firm style, even though other persons of similar names have already formed a partnership under the same style. The law will not protect a person in the exclusive use of his name in any business, but it will protect a partnership against the dishonest use of its name, even by persons having a similar name.

In the formation of a professional partnership it is advisable for the members to use their full names instead of the surnames.

Thus, if Clarence Smith and Vernon Jones form a partnership to engage in the practice of law under the name of Smith and Jones, and, at the end of a few years, Jones withdraws from the firm to go into business for himself he is in the position of a man just embarking in business. The firm of Smith and Jones may have established a good reputation, but many of the firm's clients may not know that Jones is Vernon Jones. If, however, the firm name had been Clarence Smith and Vernon Jones, the good-will attaching to the names would be preserved by each.

Upon the dissolution of a partnership by lapse of time, agreement or otherwise, the right to use the old name is usually sold to a continuing partner. The retiring partners frequently limit their right to resume business or to use the firm name.

GOOD-WILL.

19. **The good-will is an incident of a business founded upon and created by the conduct of that business. It is the "expectation of continued public patronage."**

The good-will of a business is property and can be taxed, sold or transferred as such.

The term "good-will" can be more easily described than defined. The definition most frequently used is that "the good-will of a trade is nothing more than the probability that the old customers will resort to the old place," a good definition to apply to a trading partnership doing business at a particular place. But in a professional partnership or a partnership of brokers, the good-will does not attach to the locality but to the person. In a law partnership, for instance, persons deal with the firm, not because it is located in a particular office building, but because of the ability and character of the members of the firm. So the good-will is primarily the reputation of the firm as established by the conduct of its business. If the business has been conducted in a business-like way and customers or clients have been satisfied with the character of the goods or work, it is safe to say that the firm may expect "continued public patronage," and therefore it has a good-will. But if a firm has established a reputation for dishonesty and unfair dealing, its good-will, so called, will only be a fiction.

Good-will is not a characteristic of all partnerships. If a firm has been formed for the conduct of a single enterprise, such as the construction of a railroad, it is apparent that there will be no good-will.

The good-will of a business is considered a part of the partnership assets and may be taxed, sold or transferred as such. It is not a part of the stock in trade and a sale of the stock itself does not include the good-will, but it will be included where all of the assets of a firm are sold. Where a partnership is dissolved by the death of one of the members, the good-will is generally considered an asset, the proceeds of which are divided among the surviving partners and the estate of the deceased partner.

THE FIRM CAPITAL.

20. The firm capital is the total of the contributions which the partners have made for the transaction of the partnership business.

Whatever is contributed by the members of the firm as capital becomes a part of the firm property and is owned by the members jointly.

Contributions of capital may be in money, personal property, real estate, services or other property.

In the formation of an ordinary partnership each member contributes property to the firm for the transaction of the firm business. The aggregate of these contributions constitutes the firm capital. After the firm has been doing business for some time the members may and often do agree to make additional contributions, which will also be considered a part of the firm capital.

Thus, *A* and *B* form a partnership for the conduct of a general merchandise store. *A* contributes a stock of goods valued at $3,000 and *B* contributes goods valued at $2,000. The business prospers and within a short time profits are realized to the extent of $1,000. These profits are used to purchase a new set of fixtures for the store. The fixtures are a part of the partnership property, but not a part of the capital.

Upon dissolution of a partnership disputes frequently arise between the partners as to the distribution of the assets of the firm, and as a general rule the division of profits is not made in the same proportion as the contributions of capital. It sometimes happens that a partner contributes only the use of property, retaining the title for himself. It is therefore advisable to have the contributions of capital clearly set forth in the articles of co-partnership. Upon dissolution the capital is distributed in the same proportion

as furnished, and if a partner contributes only his skill and services he is not entitled to a distributive share of the capital. (See Appendix B, Case No. 113.) He will receive compensation for his skill and services upon receipt of his share of the profits of the business. Where losses have been sustained, the legal presumption is that the partners are required to pay into the partnership their share of the loss. The partners, however, can agree to a readjustment of capital on account of losses made. The distribution of capital would then be on the new capital ratio.

The contributions of capital, in any form, at once become the property of the firm, and are no longer owned by the contributors as individuals.

Where partnership articles provide that one partner is to put in as capital a building and machinery valued at $9,615, the other two to contribute $2,500 in cash and to pay the first partner interest on the excess put in by him, each partner will have a joint ownership of the building and machinery. If the building is destroyed by fire, the loss must be borne by the firm and not by the contributing partner.

Capital need not be contributed in money. It may consist of personal property, real estate, services, patent-rights or any other property which the parties may agree to receive. It is not necessary that the contributions shall be of the same character or of the same amount. One may contribute $1,000 worth of personal property, another $500 in cash and a third may add his labor and skill. If a partner contributes the use only of property he should have it affirmatively appear that he is still the owner thereof and that he is entitled to the return of the identical property upon the dissolution of the firm. If a partner makes an advance or loan to the firm, he becomes its creditor and is entitled to reimbursement as against his co-partners. Ordinarily

interest is not payable on a partner's indebtedness to the firm, or on the firm's indebtedness to a partner in the absence of an agreement to that effect.

THE FIRM PROPERTY.

21. "Firm property" includes all of the contributions to capital and all property acquired with partnership funds or credit, or in partnership transactions. It includes the profits of the business as well as the good-will.

Partnership property includes everything of value which belongs to the partners as a firm. Contributions of capital, property acquired with partnership funds or credit, profits and the good-will of the business are all a part of the firm property. The title to partnership property must be in the firm either legally or nominally. If one of the members of a firm contributes only the use of certain property the title to such property still remains with the contributing partner and the property itself does not belong to the firm.

The intention of the parties will usually determine whether property used in the partnership business is owned by the firm or by an individual member. Such intention may be shown by an express agreement between the partners, or, in the absence of such an agreement, it may be shown by the conduct of the partners and the circumstances under which the property was purchased and later used.

PERSONAL PROPERTY.

22. The title to personal property may be held in the firm name, or by one or more of the members as individuals.

Irrespective of the method of acquiring or holding title to partnership personalty, the real ownership of the property is in the partners as a firm and not in the individual members as co-owners.

The ownership of firm property is substantially different from any other kind of ownership. A partner has an undivided interest in every piece of partnership property; yet the partners cannot be classed as owners in common for the reason that each partner has the implied authority to sell all or any part of the partnership property, whereas in an ownership in common each co-owner has an undivided interest in the entire property, with authority to sell only his interest therein. In a partnership it might also develop that one of the members of the firm has no real interest in the property, having previously withdrawn amounts in excess of the value of his interest. Partnership is somewhat similar to joint tenancy, as upon the death of one partner, the possession and management of the firm passes to the surviving partners and not to the personal representatives of the deceased partner. In joint tenancy, however, the *title* passes to the survivors, while in a partnership only the *possession* passes to the survivors, who are obliged to account to the personal representatives of the decedent for the value, if any, of the deceased partner's share. There are several other distinctions between ownership by partners and ownership by joint tenants or tenants in common. Ownership by partners is the result of a voluntary agreement between the partners, while co-ownership by joint tenants or tenants in common may be, and very often is, the result of an act by a third person who does not consult the wishes of the co-tenants. One making a will may devise his real estate to his children, share and share alike, and upon the death of the testator the children become co-owners of the

real estate. The co-ownership in this case results from the act of the father and not from any agreement of the children. Again, a co-owner is not necessarily the agent of the other co-owners, but in a partnership each member is an agent of his co-partners.

The title to personal property may be held in the firm name or in the name of one or more of the members as individuals. If the property was acquired with partnership funds, or with firm money, or partnership services have been expended upon it, the law will generally consider the title to the property in the firm and not in the individual members thereof. (See Appendix B, Case No. 114, and Case No. 115.)

REAL ESTATE.

23. Title to partnership real estate should be taken in the names of all of the partners as tenants in common. The firm name should not be used in real estate transactions.

If inconvenient to take title in the names of all of the partners and the title to partnership real estate is taken in the name of one partner, a resulting trust arises in favor of the firm.

It is a well settled rule of law that only a person can hold the legal title to real estate, and a partnership, as has been said, is not in law a person. It follows then that a partnership, as such, cannot hold the legal title to real estate. If a deed of real estate is made to a firm having a fictitious name, no title passes thereby. If a deed is made to a firm having the names of its individual members, the legal title will pass to the partners named, in trust, however, for the firm. If a conveyance is made to "H. R. Hedman & Company," the title would pass to H. R. Hedman alone; but if

the conveyance was to "Hedman and Beecher," it could be shown that the grantees were H. R. Hedman and S. H. Beecher. In the latter case, the legal title would pass to the partners named in trust for the firm.

If the members of a firm are very numerous, or it is otherwise inconvenient, it is sometimes advisable to take title to the firm real estate in the name of one partner. The difficulty with such an arrangement is that the holding partner might secretly convey the property to a third person, for a valuable consideration, without his having any actual, implied or constructive notice of the interests of the co-partners, in which case the purchaser would acquire rights in the property which would be superior to those of the partnership, or of its creditors. (See Appendix B, Case No. 115.) However, if the partnership was in possession of the property at the time of the sale, the purchaser would be charged with constructive notice of the firm's interest in the property.

In a court of equity the real estate of a partnership is sometimes treated as personal property for the purpose of settling the accounts of the partners and winding up the partnership affairs. This equitable doctrine is known as "conversion," the real property by fiction being temporarily converted into personal property. The rights of the heirs, widow and creditors of a deceased partner in the firm real estate are all subject to the superior right to use the realty, or so much thereof as may be necessary, in closing the partnership affairs. As soon as the object of the conversion has been accomplished, the property will be treated in its character as real estate.

Thus, *A, B* and *C* are conducting a partnership which owns real estate. *A* dies leaving him surviving a widow and three children. The surviving partners take over the property of

the concern for the purpose of winding up the business. After taking an account it is found that the personal property of the firm is sufficient to meet all obligations. In such a case the real estate retains its character as such and the widow and heirs of the deceased partner will receive their shares provided for by law. But if the personal property is not sufficient to settle the accounts of the firm, the real estate will be considered personal property for that purpose. If it is necessary to use all of the firm realty to pay the firm debts, the heirs of the deceased partner will receive nothing. If only a part of the real estate is used for that purpose, the remainder will resume its character as real estate, and be divided among the surviving partners and the heirs of the deceased partner.

CHAPTER IV.

THE POWERS OF A PARTNER.

24. In General.
25. Apparent Authority.
26. Powers Implied.
27. Powers Not Implied.
28. Negotiable Instruments.

IN GENERAL.

24. The relation of partnership is essentially the relation of principal and agent. Each partner occupies a dual position, being a principal with each of his co-partners as his agent, and an agent of all his co-partners.

The law of partnership is founded upon the law of principal and agent. There is a presumption that each partner is a general agent of the firm, and as such he represents all the powers of the firm within the scope of the partnership business. As to third persons, a partner's authority may be of two kinds, (1) real authority, or that which is actually conferred upon him by the partners themselves, and (2) apparent authority, or that which he appears to have by reason of the character of the business. When a partner has real authority or actual authority to make a contract for the firm, no difficulty arises, for the reason that the partnership will always be bound by the authorized act of a partner; but where a partner merely appears to have authority the question is not so simple.

APPARENT AUTHORITY.

25. The apparent authority of a partner is confined to the scope of the partnership business and persons dealing with a partner are presumed to know the scope of the business.

It is a rule of agency that third persons dealing with an agent should investigate the agent's authority and act in good faith, with the exercise of reasonable prudence. The same rule applies to partnerships. A person dealing with a partnership through a partner should exercise the same discretion. He should first find out whether a partnership exists and then familiarize himself with the general character of the partnership business. The character of the business, in the absence of any express limitations, will determine, in a general way, the implied powers of a partner. A few examples will illustrate:

A member of a real estate firm does not have apparent authority to purchase a suit of clothes for himself in the partnership name; nor has a member of a milling firm apparent authority to give a partnership note in satisfaction of his personal indebtedness. A member of a printing concern which publishes a newspaper cannot accept on behalf of the firm an agency to sell pianos; nor can a member of a storage and commission house engage in cotton speculation for the firm.

It is important in this connection to distinguish between a trading and a non-trading firm for the reason that the apparent authority of a member of a trading or commercial firm is much more extensive than that of a member of a non-trading partnership. If a partnership is primarily engaged in the business of buying and then selling the thing purchased, either in the same or in altered form, it is a trading or commercial partnership; if not so engaged it is a non-trading partnership. Partnerships engaged in the business

of buying and selling drugs, groceries, dry goods and clothing, and manufacturing establishments of practically every kind, are considered trading firms. Law partnerships and those engaged in farming or mining are considered non-trading firms. As a general rule the member of a non-trading firm has no implied authority to bind the firm on negotiable paper unless it can be shown that the act of the partner was necessary in order to carry on the business of the firm, or that it was customary among partnerships of that character.

A partner's apparent authority may be withdrawn by agreement among the partners, but such limitations of power will not be binding upon third persons unless they have actual knowledge of the restrictions.

Where a member of a partnership in the plumbing business, having had his apparent authority restricted by express agreement, purchases supplies from a wholesale plumbing house which has no knowledge of the restriction, the firm will be liable for the act of its member.

It should be remembered that the discussion of the subject of actual and apparent authority is only for the purpose of determining when the firm is liable for the acts of its members, and in no way affects the individual liability of a partner for his own acts. A partner lacking authority to bind the firm will nevertheless bind himself personally, either on the contract as a principal, or on an implied warranty that he had authority to bind the firm, or, in tort, if he has acted fraudulently.

POWERS IMPLIED.

26. A partner has implied authority:

To receive payment of debts due to the firm and to give receipts in the name of the partnership.

To compromise a claim of the firm against a third party.

To assign rights of action which the partnership may have.

To employ such agents or servants as are necessary for the proper transaction of the firm business.

To insure firm property.

To make contracts in reference to the business of the firm.

To purchase, on the credit of the firm, goods which are necessary in the conduct of the partnership business.

To sell any part or all of the partnership goods which are for sale.

To employ an attorney to bring a suit for, or defend a suit against, the firm.

To acknowledge a debt of the firm and to bind the firm thereby.

To bind his firm on a lease of real estate which is necessary for the purposes of the firm.

In the consideration of the particular powers of a partner, it is necessary to distinguish between the powers of a partner before and after dissolution, because of a substantial distinction between the two. The powers here enumerated are the implied powers of a partner exercised in the conduct of the firm business before dissolution.

A partner has implied authority to receive payment of debts due to the firm, whether trading or non-trading, and to give receipts therefor. (See Appendix B, Case No. 116.) From a practical standpoint, it would be a great inconvenience to all parties if the rule were otherwise, as it would require the presence of all partners at the place of business at all times in order to receive payment of debts due the firm. Such an awkward arrangement is not contemplated by the members of the firm when it is formed. A partner also has the power to compromise a claim against a third party, provided the settlement is made in absolute

good faith and no fraud or collusion is present. If the partnership has a claim or a right of action against a third person, one member of the firm may assign that right for a valuable consideration.

One of the necessary duties in the conduct of a partnership business is employing and discharging agents and servants. Each partner has implied authority to employ such help as is necessary in the transaction of the partnership business. (See Appendix B, Case No. 117.) The necessary help may include the employment of an attorney to bring suit for, or defend a suit against, the firm. If there is an actual dissent by the other partner or partners, the new employee or agent will be discharged. If the partners are equally divided on the question, the employee should be removed on the theory that affirmative action should be supported by more than one-half of the membership of the firm.

It would follow from the discussion of the apparent powers of a partner that each member of the firm has implied authority to insure partnership property, to make contracts in reference to the ordinary business of the firm, to purchase, on the credit of the firm, goods which are necessary in the proper conduct of the partnership business, to sell any part or all of the partnership goods which are for sale, to enter into a lease of real estate which is necessary for the transaction of the partnership business and to do any acts which fall within the ordinary and usual course of the firm's business as actually conducted.

POWERS NOT IMPLIED.

27. A partner does not have implied authority:

To make an assignment of the assets of the firm for the benefit of creditors.

To bind the firm by a deed or other instrument under seal.

To confess judgment against the firm; or to give a warrant of attorney to do so.

To bind the firm by the submission of partnership matters to arbitration.

A partner does not have implied authority to make a general assignment of the property of the firm for the benefit of its creditors for the reason that such action causes a dissolution of the firm, and the implied authority of a partner is to run the business and not to stop it. (See Appendix B, Case No. 118.)

A partner has no implied authority to bind the firm by a deed or other instrument under seal. Various reasons for the rule have been given, the one most frequently given being that a partner should have no implied authority to prefer favorite creditors by conveying or creating liens upon the real estate of the firm. A release under seal given by one of the partners is a well known exception to the general rule. Contrary to the general rule of agency, authority to execute a sealed instrument may be conferred orally, and a valid ratification may be effected orally as well.

One partner cannot execute a warrant to confess judgment against the firm without the express consent of his co-partners.

The usual warrant to confess judgment authorizes any attorney to appear for the maker or signer of the document in any court and consent to the entry of a judgment without a formal trial. The judgment, when entered, is called a "judgment by confession." Promissory notes containing such a clause are called "judgment notes." A judgment by confession is usually entered without the knowledge of the defendants.

If such a power was given to the individual members of a firm, it would be possible for one partner, by the abuse

of that power, to place the firm in an insolvent condition within a few hours. The other partners would be deprived of the right to be heard in court in the regular way. The use of such a power is not necessary in a partnership, and its exercise is not within the scope of the business.

A member of a firm has no implied authority to submit partnership matters to arbitration, for the reason that the other partners would be deprived of the right to present their case in court in the regular way. The implied powers of a partner recognized by law are extremely broad, and the law will not permit them to be extended so as to include unnecessary and harmful authority.

NEGOTIABLE INSTRUMENTS.

28. In a trading firm each partner has implied authority to sign the name of the firm to negotiable paper.

In a non-trading firm, as a general rule, a partner does not have implied authority to bind the firm on negotiable paper.

Each member of a trading partnership has implied authority to bind the firm by making, endorsing and accepting bills of exchange and by making and indorsing promissory notes in the name of the firm, provided the instrument is given for partnership purposes. A partner is not impliedly authorized to give a partnership note for other than partnership purposes. If a partnership note is given for a personal debt of one of the partners, a person taking such a note, with knowledge of that fact, could not recover from the firm unless the maker had been expressly authorized to sign the note; but if an unauthorized partner executes a firm note to himself as payee and then endorses the same to an individual creditor who does not have any knowledge of the irregularity, the firm will be liable on the note, it not being uncommon for a firm owing a partner to give

him a note as evidence of the indebtedness. Thus, if *A*, a member of the firm of A, B and Company, makers of automobiles, gives a partnership note to his grocer in payment of a grocery bill, without the consent of his co-partners, the firm would not be liable to the grocer because the note was not given for partnership purposes; but if *A* had improperly executed a partnership note to himself as payee and had then endorsed it to the grocer, the firm would be liable if the grocer did not have actual knowledge of the irregularity. In all cases a bill or note signed in the firm name by a partner without authority can be enforced by a *bona fide* holder, that is, one who acquires the instrument in good faith, for value and without knowledge of the circumstances under which it was given. However, if the firm is forced to pay such a note, recourse can be had against the partner giving it; and in any event such partner is individually liable to the holder.

In non-trading partnerships it has been generally held that one partner does not have implied authority to bind the firm by making, endorsing or accepting negotiable paper; and this is true even though the act was for the benefit of the concern and within the scope of its business. (See Appendix B, Case No. 119.) There is a presumption that the partners do not have such authority, and it can be rebutted only by showing that the action was necessary, or customary among firms of that general character.

A and *B* form a partnership for the express purpose of renting and cultivating a farm. *A* furnishes the money and *B* superintends the operations, giving his time and labor to the business. *B* executes a promissory note in the name of the firm to *C*. In a suit on the note it is necessary to show, in the absence of express authority or of ratification, that *B*'s act was necessary in the particular case, or, if not necessary, customary among farming partnerships.

A *bona fide* holder of a note of a non-trading partnership will acquire no greater rights than the original payee, in so far as authority to execute the note is concerned, for the reason that everyone is presumed to know the scope of business of a partnership. A person buying partnership paper is expected to know or to ascertain the character of the business; and if it is a non-trading partnership he will be charged with knowledge of the limited powers of the partners.

If a partnership has a firm name, all negotiable paper of the firm should be signed in that name. There is a presumption that a note signed by the individual partners is not a partnership note, but was given in a transaction independent of the firm business. This presumption, however, is not conclusive, evidence being admissible to show the true nature of the transaction. It is always advisable for a person taking a partnership note or contract to have the name of the acting partner appear thereon, although the absence of such name will not affect the partnership liability. A note signed "Warren & Dickson, by Dickson" would tend to prove that the note or contract was given in a firm transaction and that the partnership name was signed by Dickson. It is also advisable for a person taking a partnership note or contract to have all of the partners' signatures below the firm name, so that no question as to authority can ever be raised. If the partners refuse to sign the note or contract it is good business, and not at all offensive, to request a memorandum signed by all of the partners conferring actual authority upon the acting partners.

If a partnership has no firm name, a person taking its note or contract should require the signatures of all of the partners, in which event they can be held individually and also as partners.

CHAPTER V.

DUTIES, RIGHTS AND LIABILITIES OF PARTNERS AMONG THEMSELVES.

29. Duties of a Partner.
30. Rights of a Partner.
31. Rights Not Possessed.
32. Management of the Business.
33. Actions of Law Between Partners.
34. Actions in Equity Between Partners.

DUTIES OF A PARTNER.

29. The partnership relation is founded upon mutual trust and confidence. Each partner owes to the others the utmost good faith in all transactions affecting the partnership in any way.

A contract of partnership is viewed in law as the foundation of a relation of mutual trust and confidence. It is one of a class of contracts known as *uberrimae fidei* (Latin, of the utmost good faith). As the partnership relation is a personal one and the apparent authority of the members of a firm is usually very broad, each partner must necessarily depend upon the honesty and good faith of his co-partners. Each partner is entitled to know what his co-partners know, one member not being allowed to gain any secret individual advantage at the expense of the firm. A partner is not permitted to retain secret commissions obtained in the purchase or sale of goods on behalf of the firm; nor can he engage in a competitive business, thereby depriving his firm of his services, skill and knowledge. If he engages in such business he can be held to account to the firm for profits

earned if any. Ordinarily he is not permitted to place himself in a position where his own personal interests are opposed to those of the firm; for it is natural to expect that where a member's interests are opposed to those of the firm, the firm will suffer thereby. Of course, if the co-partners expressly or impliedly consent to a partner engaging in a competitive business, they will have no cause to complain.

If a member of a drug concern purchases supplies from a wholesale chemical house at a price which is higher than the regular rate and retains the difference for himself, he will be compelled to account to the other members for his profit; or if he speculates with the partnership funds or credit, retaining the profits for himself, he must account to his co-partners for his gains.

Each partner is expected to keep accurate accounts of all partnership transactions, and to have them ready for inspection at the place of business at all reasonable times. All of the co-partners have the right to look over the books at any time. It is the duty of each partner to exercise a reasonable degree of care and skill in the conduct of the firm business, having due degard for the rights and opinions of his co-partners.

RIGHTS OF A PARTNER.

30. In the absence of an agreement to the contrary, each partner has the right:

To participate in the management of the business.

To examine the partnership books of account at all reasonable times.

To carry on a separate business, which is outside of the scope of the firm business.

On dissolution, to have partnership property applied to the payment of the debts and liabilities of the firm.

In the absence of a special agreement on the subject, each partner is permitted to participate in the active management of the firm business. As they are co-owners of the business and share in its profits, it is to be expected that the partners will be vitally interested in the conduct of the firm affairs. The members of a firm may, however, by agreement limit the right of one or more of its members to transact firm business. They may place the transaction of all of the firm business in the hands of one man. Such restrictions would be binding as between the partners themselves, but a third person who deals with one of the partners without notice of the limitation of his power may hold the firm liable notwithstanding the partner's lack of authority; but the unauthorized partner will be liable to his co-partners if a loss results from his unauthorized act.

Each partner has the right to know what his co-partners are doing with the firm property and credit. As a result of that right, there arises a duty to keep accounts for the inspection of the other partners. Where one partner fails to keep an account of his transactions, every presumption will be against that partner on a final accounting.

In the absence of an express agreement to the contrary, a partner has the right to carry on a separate non-competing business outside of the scope of the firm business, provided it does not interfere with his duties to the firm. If the partner has agreed not to carry on a separate business, he is acting in violation of his contract, and the other partners would have their remedy by injunction; but he would not be compelled to account to the other partners for profits made in the separate venture. (See Appendix B, Case No. 120.)

Where one of the members of a partnership is obliged to pay or does pay a firm obligation out of his private funds, he is entitled to contribution from his co-partners for the

reason that a partnership debt is the joint obligation of all the partners; and, if a partner, acting for the firm in good faith and with authority, incurs a loss or expense on a partnership contract, he is entitled to be reimbursed by the firm for such loss and indemnified by the firm against any obligation arising therefrom. (See Appendix B, Case No. 121.)

Where a partner deposits partnership funds in a bank with the consent of his co-partner, and afterwards takes control of the fund in order to compel his co-partner to have an account taken, and, pending the adjustment of differences, the bank having the fund fails, the loss must be borne by the firm. There are cases, however, where the right of contribution or indemnity cannot be enforced. Where a loss has occurred or a liability been incurred through the negligence of a partner, or without authority or in bad faith the rule will not apply.

On a dissolution each partner has the right to have the partnership property applied to the payment of partnership debts. This is sometimes known as a "partner's lien"; but it is merely a right to share in the partnership assets after the payment of the partnership debts. It prevents one partner from applying the partnership property to the payment of individual debts, and prevents the individual creditors of a partner from applying his interest in the firm to the payment of his individual debts before the partnership debts have been paid.

RIGHTS NOT POSSESSED.

31. In the absence of an agreement to the contrary a partner does not have the right:

To receive extra compensation for any services rendered for the partnership.

To conduct a separate business in competition with the firm.

To apply the partnership property to his own individual uses.

To receive interest on any balance due him from the firm.

In the ordinary partnership each member agrees to give his time, labor and skill to the business of the firm in the hope of increasing the profits. If one member happens to be more active and energetic than the others, or is possessed of a greater degree of skill and renders more valuable services, he is not thereby entitled to extra compensation. The rule is the same where one partner is obliged to do additional work on account of the sickness of his co-partner (See Appendix B, Case No. 122); and, under ordinary circumstances, even a surviving partner has no claim for extra compensation for winding up the business of the firm.

If a member of a partnership carries on a separate business of a like nature in competition with the firm, he is acting in direct violation of his primary duty toward his co-partners, which is to act in utmost good faith. He is not expected to gain any private advantage; and if he does so he can be compelled to account to his co-partners for the profits gained.

In the absence of an agreement to the contrary, it is a general rule that interest will not be allowed on partnership accounts until after a settlement between the partners. It may even be said that where there is a balance in favor of one of the partners, interest will not run in favor of the creditor partner. Where a partner is indebted to the firm on an authorized withdrawal of funds, interest on the indebtedness will not be allowed, and the same rule applies to the contributions of the partners to the firm's capital. In the case of advances to the firm the rule seems to be different. It was formerly held that even such accounts did not bear interest, but the modern doctrine appears to be that where a partner makes an actual payment or loan to

the firm for partnership purposes, and such loan is in excess of the capital which he agreed to contribute, and was necessary or very advisable, he is entitled to interest at the legal rate.

MANAGEMENT OF THE BUSINESS.

32. The powers of a majority of the partners may be determined by the articles of co-partnership.

In the absence of express provisions in the partnership agreement, the acts of a majority in number will generally prevail, if those acts are within the scope of the partnership business, in good faith, and for the benefit of the firm.

It is not unusual for partners to have different opinions as to the manner in which the ordinary business of the firm should be conducted. When such a difficulty arises, and there has been no previous agreement on the subject, a majority in number, not in interest, controls.

Thus, if *A* has contributed ⅝ of the capital of the firm and *B* and *C* together have contributed the remainder, *B* and *C*, although contributing less than one-half of the firm capital, would control the business of the firm and decide disputed questions, unless there was an express agreement that a majority in interest should control.

However, the acts of a majority of the members must be within well defined bounds. In matters which fall within the scope of the firm business the acts of a majority will undoubtedly prevail, provided the majority is acting in good faith and for the benefit of the firm. Thus, if a partnership is formed to carry on a meat-market, a majority might decide how large a stock of meats should be kept on hand, and might fix the prices and terms of sale and hire the necessary help; but if a majority agree to overrule all suggestions of the minority, whatever they might be, then the

agreement is not in good faith, and it could be rescinded. In any case if the majority decide to act on any question, notice of such proposed action should be given to the other partners, so that they may have an opportunity to object.

Where the partners are equally divided on a question of change of policy, those opposed to the change will prevail.

In fundamental matters, involving changes in the business or the terms of partnership, it is necessary to have the consent of all partners. If the rule were otherwise, the interest of a minority partner would be practically worthless, for the majority would then be able to change the business of the firm, engage the firm in a new and different business, or even change the profit sharing ratio.

Thus, if *A, B* and *C* form a partnership to conduct a dry goods store with an agreement for an equal division of the profits, *A* and *B,* constituting a majority of the firm, cannot enlarge the business to include a grocery store without *C*'s consent; nor can they make a new agreement for a division of the profits so as to reduce *C*'s share thereof.

In the absence of a special agreement to the contrary, a majority of the partners may order a division of the profits at any time; but the proportions of profit and loss cannot be fixed or changed by a majority. The articles of co-partnership usually provide for the division of profits and losses, but where no agreement has been made there is a presumption that the profits and losses will be shared equally, and unequal contributions of capital will not affect the profit and loss sharing ratio. (See Appendix B, Case No. 123.)

Thus, *A, B* and *C* form a partnership for the purpose of buying and selling books. *A* contributes $6,000, *B* $2,000, and *C* $1,000. No agreement is made for a division of the profits. At the expiration of the first year the profits of the concern amount to $9,000. Upon a division of the profits each partner will receive $3,000 as his share.

ACTIONS AT LAW BETWEEN PARTNERS.

33. A member of a partnership cannot sue the firm at law; nor can the firm sue one of its members at law.

As a general rule one partner cannot maintain an action against his co-partners on a claim arising out of the partnership transactions until after dissolution and settlement.

At common law in a suit against a partnership, all of the partners must be joined as defendants. Hence, if a partner were allowed to sue the firm he would be in the absurd position of a man suing himself—a situation which the law does not permit. For the same reason a partnership cannot sue one of its members at law.

If one partner purchases goods for the firm and pays for the same out of his own funds, he cannot sue the firm for the cash advanced; or, if the firm sells the partner some goods on credit, it cannot maintain an action for the purchase price. The only remedy in either case is by a bill in equity for an accounting, which usually means a dissolution.

It is also a general rule of law that a member of a firm cannot sue a co-partner on a claim growing out of the partnership transactions. The reason for such a rule is: first, a partnership transaction usually involves the firm, and, as stated, one member cannot sue the firm; and, second, the conflicting rights and claims of co-partners are so numerous that a proper adjudication of all of them necessitates the taking of a partnership account. After an account has been taken and the balance due has been ascertained, a partner may then sue his co-partners for the amount found to be due; or, if a contract of settlement has been made, and one of the members fails to perform his part of the contract, an action for damages may be maintained for a breach of contract.

Where a partnership has never been created, or where the transaction does not affect the business of the partnership, there is no reason why an action at law could not be maintained. If two persons agree to form a partnership and one of them breaks the agreement, the other may maintain an action at law for damages for breach of contract. In such a case a partnership has never been formed, and partnership accounts are not involved. It is merely the suit of one individual against another. The same is true where two members of a firm make a contract which is separate and distinct from the partnership business.

A and *B* are partners, operating a department store. *A* is the owner of a touring-car bought with his own funds, for his own personal use. He sells the car to *B* for $1,000, a part of which is paid in cash, the balance to be paid within two months. If *B* refuses to pay the balance at the end of two months, *A* has a right to sue *B* and to recover a judgment for the balance due.

Where one partner commits a tort affecting the person or property of a co-partner, an action in tort by the injured party will lie. If two partners disagree over partnership matters and in the heat of their quarrel one strikes the other with his fist, the party injured may maintain a suit in tort against his co-partner for damages sustained.

ACTIONS IN EQUITY BETWEEN PARTNERS.

34. A court of equity is the proper tribunal for the adjudication of all ordinary partnership matters.

Injunctions are sometimes granted in partnership matters, and receivers are occasionally appointed; but the chancery proceeding most frequently occurring is a bill for an accounting and dissolution.

For the reasons already given the adjudication of all ordinary partnership matters is left to the courts of chancery, or courts of equity as they are sometimes called. In a chancery suit all interested persons should be made parties, either as complainants or defendants.

The usual chancery suit in an action between partners is a bill for an accounting and dissolution, in which the chancery court winds up the business of the firm, determines the rights and interests of the partners and creditors and distributes the property of the firm according to law. Occasionally, however, a partner resorts to a court of chancery for other purposes. If one of the members of a firm is engaged in a competing business, or is appropriating the firm property to his own use, or is unduly hindering, impeding or otherwise injuring the business of the firm, an injunction will lie to restrain him from so doing; and sometimes receivers are appointed to take charge of the business and conserve the assets of the firm.

CHAPTER VI.

RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

35. Liability of Partners on Partnership Contracts.
36. Undisclosed Partnership.
37. Nature of Liability.
38. Liability in Tort.
39. Incoming and Retiring Partners.
40. Enforcement of Liability.
41. Application of Assets to Liabilities.

LIABILITY OF PARTNERS ON PARTNERSHIP CONTRACTS.

35. All of the members of a partnership are jointly liable on any contracts made in the partnership name by a partner who is expressly or impliedly authorized to make such contracts.

In a preceding chapter the express and implied powers of a partner have been considered, from which it will be seen that if a partner has been expressly or impliedly authorized to make a contract, and such contract is made in the partnership name by that partner, all of the members of the firm will be liable thereon. In the exercise of implied authority, if the power of the contracting partner had been expressly limited by agreement, the firm would still be liable to persons who had no knowledge of the restriction.

A and *B* have formed a partnership for the purpose of operating a restaurant. The articles of co-partnership provide that *A* shall do all of the buying for the firm, and that *B* shall not do any of the buying. *B* purchases a supply of food from

a wholesale house, the members of which have no knowledge of the articles of co-partnership. The partnership is liable for the purchase price of the food.

This liability extends to everyone who was a partner at the time of the making of the contract. A nominal partner is liable, as his connection with the firm is known; a secret or dormant partner is liable when discovered, to the same extent as a nominal partner or ostensible partner, as he is an undisclosed principal. A retiring partner remains liable for all of the partnership debts existing at the time of his retirement, although they are assumed by the continuing partners, unless he is expressly or impliedly released by the partnership creditors. An incoming partner, however, is not liable for partnership debts existing prior to the time of his joining the firm unless he expressly or impliedly assumes them.

On account of the unlimited liability of partners to creditors of the firm the partnership relation is usually avoided by capitalists who make a practice of investing in business enterprises. While most people are willing to risk a specified sum in a particular undertaking, they do not desire to take a chance of having their entire fortunes wiped out. In order to encourage the investment of money in home industries, thereby benefiting the people of a locality by having the capital employed in local enterprises, the legislatures of many states have passed laws authorizing the formation of limited partnerships. But limited partnerships have not been popular in this country for the reason that an error in the organization of such associations may subject the members thereof to the liability of general partners. Corporations have usually been preferred to partnerships in recent years for the reason that under modern statutes corporations can be formed for almost any purpose, and stockholders are not

generally liable to corporate creditors if the face value of the stock has been paid in full.

UNDISCLOSED PARTNERSHIP.

36. An undisclosed partnership, when discovered, is generally liable for contracts made by a partner in his own name except:

Where the creditor leads the principal to believe that he has been paid by the partner, and the principal or firm thereupon reimburses the partner.

Where the creditor, after the principal or firm has been discovered, elects to hold the partner individually.

On negotiable instruments.

On contracts under seal.

The liability of an undisclosed partnership is the same as that of an undisclosed principal in the law of agency. Each partner is the agent of the firm in the conduct of all ordinary partnership transactions. A partner is an agent and the firm is a principal; hence, as in agency, an undisclosed partnership, when discovered, is liable for the contracts of its partner or agent, with the exceptions already noted. Where the plaintiff or creditor has led the firm to believe that he has been paid by the contracting partner, and the firm, relying upon such belief, has reimbursed the partner, the creditor can hardly expect the firm to pay the money a second time; and it is well settled in the law of agency that where a person has contracted with an agent of an undisclosed principal, he may hold the agent or the principal, when discovered, but he cannot hold both; and if, with knowledge of all the material facts, he chooses to hold the agent, the liability of the principal is thereby discharged. Applying this rule to the law of partnership, it follows that if a person has dealt with a partner, who is in

reality acting for an undisclosed firm, he may hold the partner or the firm, when discovered, but, if, with full knowledge of all the material facts, he elects to hold the partner individually, the liability of the firm is thereby discharged.

An undisclosed partnership is not liable on a negotiable instrument signed or endorsed by a partner in his own name for the reason that only parties to a negotiable instrument can be bound thereby. The same general rule applies to contracts under seal, as at common law only those whose names appeared on a sealed instrument could be liable thereon.

Where a partnership is carried on in the name of an individual, contracts executed in that name for the firm will make all of the members liable thereon; but where a contract is made in the name of an individual, evidence is usually admissible to show whether the contract was intended to bind the firm or the individual.

NATURE OF LIABILITY.

37. The liability of partners upon partnership contracts is joint and not joint and several.

In a suit brought by a firm, all who were partners at the time the contract was made must join as plaintiffs; and in a suit on a contract against a firm all of the known partners must be made defendants. If a suit on a contract should be brought against fewer than all of the partners they could plead the non-joinder of the others; but if no objection is made by any defendant partner, a judgment against those sued would be valid, and the partners not joined could not be held liable in a second suit by the creditor, as the contract obligation has been merged in the judgment.

After a judgment has been obtained against partners, the judgment creditor can elect to proceed against the partnership property, or against the individual property of any partner. He may select any partner and proceed to levy an execution against that partner's individual property, leaving the partners to adjust any questions of contribution among themselves. Such a proceeding is justified and supported by the theory that each partner is liable for all of the firm obligations regardless of his proportionate share of the firm, or his agreement with his co-partners. A limitation of liability by agreement with his co-partners will not protect him from a creditor who had no knowledge of such restriction before the liability was created.

As the common law liability of partners on a contract is joint, and not joint and several, it follows that a judgment against one on a firm contract will bar another suit against the others on the same contract; and a release of one partner will operate as a release of all.

LIABILITY IN TORT.

38. **The members of a partnership are liable for torts committed by a partner while acting in the ordinary course of the partnership business.**

The liability of partners for torts is usually joint and several.

The extent of the firm liability is the same as that of the partner who committed the tort.

If one of the partners, while acting in the ordinary course of the business of the firm, commits a wrong to the person or to the property of another not a member of the firm, all of the members of the partnership are liable therefor. Partners have been held liable for slander and for libel committed by one of the members of the firm for the

purpose of increasing the firm business. They have been held liable for the negligent driving of a firm motor truck by one of the partners. Members of a law firm have been held liable for negligent advice given to a client by one of the partners. A fraud committed by one partner in the ordinary course of the partnership business binds the firm, even though the other partners do not participate in the fraud and have no knowledge of it, and even have forbidden it.

A and *B* form a partnership for the purpose of buying and selling sheep-pelts. *C* purchases from the firm a lot of sheep-pelts, having on them a large quantity of wool. *B* without *A*'s knowledge or consent substitutes an inferior lot of pelts with the intent to defraud the purchaser. The pelts sold contained about five pounds of wool per pelt and the pelts delivered contained about three pounds apiece. *A*, as well as *B*, is liable for the fraud, even though *A* had no knowledge of it and did not participate therein.

If one of the partners commits a wilful or negligent tort while acting outside of the scope of the firm business, his co-partners will not be liable therefor because the partner has acted without authority. If, however, the acting partner has been expressly or impliedly authorized, or his act ratified by his co-partners, the latter will be liable.

If suit is brought in tort, all of the partners can be joined as defendants, or any one of them can be sued separately, as each is regarded as having individually committed the wrong, and any number less than all can be joined. A judgment against one or fewer than all of the partners will not bar a subsequent suit against the others as long as the former judgment remains unsatisfied.

If one partner is compelled to pay all of the damages for a wrongful act of the firm, out of his own personal funds, the law does not give him the right to contribution

from his co-partners, on the theory that if the individual risk is made very great, fewer torts will be committed. However, if the partner who is compelled to pay the damages had no knowledge of the tort and did not consent thereto, or if he is innocent of any wrong motive, he will be entitled to contribution from his co-partners.

If liability arises from the act of an employee who so negligently operates a motor truck that a child is injured thereby, each of the partners would be liable for the act of their servant if committed in the ordinary course of his employment; but if the act was committed without the knowledge and consent of the partners, and one partner is forced to pay the entire damages, he could compel his co-partners to contribute. However, if an employee is ordered or directed by one partner to commit a trespass, and such partner is compelled to pay damages for the resulting injuries, he would not be entitled to contribution from his co-partners.

Where a tort has been committed by a partner, the firm is liable to the same extent as the partner committing the tort. In other words, if the damages sustained amount to one thousand dollars, the firm, as well as the partner, will be liable to that extent; but, where the damages have once been paid, no further liability exists.

Where a tort has been committed by an agent or servant of the firm, the liability of the partnership is the same as in other cases of principal and agent, or master and servant.

INCOMING AND RETIRING PARTNERS.

39. An incoming partner is not liable for partnership obligations existing at the time of his connection with the firm unless he expressly or impliedly assumes them.

A continuing partner remains jointly liable with the retiring partners for firm debts existing at the time of such retirement.

A retiring partner remains liable for all of the partnership debts existing at the time of his retirement, unless the creditors have accepted the continuing partners as the sole debtors.

A retiring partner remains liable for partnership debts incurred after his retirement unless he was a dormant partner, or unless he has given proper notice of his withdrawal.

The liability of an incoming partner to creditors of the firm is usually confined to obligations incurred after the time of his admission to the firm, as the former partners were not his agents when such obligations were incurred, and parties dealing with the firm prior to his admission were not induced to extend credit to the firm on account of his membership therein, and consequently they have no cause to complain. However, if the incoming partner expressly or impliedly assumes obligations existing at the time of his admission, he will be liable therefor.

A continuing partner's liability is not affected by the retirement or admission of a partner. He remains jointly liable with the retiring partners for debts existing at the time of such retirement, and jointly liable with the incoming partner for debts created thereafter.

A retiring partner is liable for all of the partnership debts incurred during the period of his membership in the firm, even though the continuing partners have assumed such obligations, unless the creditors have accepted the liability of the continuing partners by recognizing them as the sole debtors. The acceptance of the continuing partners as sole debtors may arise by express or by implied agreement; and the creditors may be estopped from holding a retired partner. The mere receipt of payments from the continuing partners without more does not constitute an acceptance of the continuing partners as the sole debtors;

but where a creditor contracts with the continuing partners to substitute the obligation of the continuing partners for the debt of the old firm, a novation arises, and the retiring partner's obligation ceases.

Where the creditors of a partnership, upon its dissolution, agree that if certain firm goods are turned over to one partner by the others they will release the transferring partners from all liability and look solely to the remaining partner who assumes the debts and agrees to pay them, the retiring partners are thereby released. The novation, or agreement to release, is supported by the transfer of the goods, which is a sufficient consideration.

Where the creditors have not accepted the continuing partners as sole debtors, and the continuing partners have assumed the firm obligations, a relation of principal and surety results. The continuing partners are liable as principals and the retiring partners are liable as sureties.

A retiring partner, unless he was a dormant partner, remains liable for firm obligations incurred after his withdrawal, and his liability will continue until he gives due notice of his retirement. Actual notice should be given to all persons who had credit dealings with the old firm, but as to others notice by publication is sufficient. If the rule were otherwise it would work a hardship and great injustice. Persons in the habit of dealing with a partnership are induced to extend credit to the concern on the financial standing and reputation of its members. They have a right to know when a member withdraws, so that they may regulate their extension of credit accordingly. If one partner could secretly withdraw, thereby escaping liability, there is no reason why all of the partners could not withdraw, leaving the business of a concern with unlimited credit in the hands of irresponsible men; and persons dealing with the firm would soon find themselves in the position of

creditors of an insolvent concern composed of individuals with little or no financial responsibility. In all such cases the law places upon the retiring partners the obligation to give due notice of their withdrawal, and, upon their failure so to do, makes them liable to all future creditors without knowledge of the retirement, who extend credit on the supposition that the retiring partners are still connected with the firm.

Thus, *A, B* and *C* form a partnership for the purpose of doing a general banking business, under the name of *B, C* & Company. All of the members are actively engaged in the business. *A* withdraws, but does not give any notice thereof. Later, the bank issues several certificates of deposit to *D,* and shortly thereafter it becomes insolvent. In a suit by *D, A* can be held liable, as he did not give notice of his withdrawal from the partnership.

A dormant partner who is withdrawing from the firm is not obliged to give notice of his retirement because persons dealing with the partnership do not know of his connection with the concern and hence cannot be said to have extended credit on his financial standing. A dormant partner remains liable for firm obligations incurred during his connection with the partnership as he was an actual though undisclosed principal, but not for obligations incurred after his retirement, as he is not an actual principal, and there is no ground for estoppel.

ENFORCEMENT OF LIABILITY.

40. At common law a judgment against the members of a firm for a partnership obligation is joint and several, and execution may be levied on the property of the firm or on the individual property of any partner.

Where judgment has been obtained against one partner, an execution thereon may be levied on that partner's interest in the firm.

In the absence of statutory enactments to the contrary, a judgment against the members of a firm for a partnership obligation is joint and several, and a judgment-creditor of the firm may levy on the partnership property or on the individual property of any partner. If a judgment-creditor so chooses, he may levy upon the individual property of a partner in the first instance, without having exhausted his remedy against the firm property.

In some states the statutes permit a firm creditor to proceed to judgment without having served all of the partners. In such cases it is generally held that the property of a partner not served is not subject to execution.

As a general rule, after a judgment has been obtained against one partner on an individual debt, the share of a partner in subsequent proceedings is viewed as an undivided interest, and the officer making a levy upon a partner's interest in the firm is permitted to take actual possession of all of the firm property. This may seem unfair to the other partners, but it is one of the risks they assumed when they entered into the partnership; and, on the other hand, a greater injustice would result if an individual creditor of one partner could be deprived of the right to collect his claim merely because the delinquent partner had placed all of his property in a partnership business. Whenever a sheriff or other officer makes a levy upon the firm property to satisfy an individual judgment against one of the partners, he is expected to levy only upon the interest of the debtor in the firm. At the execution sale the interest of the debtor in the firm property, and not the property itself, is sold; and the purchaser at such a sale merely acquires the right

to an accounting with the other partners, and to receive whatever the judgment-debtor would have received in the event of an accounting. If the firm is insolvent the judgment-creditor would not acquire anything. In levying an execution upon the interest of one partner in a firm the rights of the co-partners must be respected. It has been generally held that if a sheriff or other officer assumes to sell the firm property rather than the partner's interest therein, he is liable to the other partners in trespass for a wrongful conversion of their property; and if a purchaser at an execution sale converts firm property to his own use, he will likewise be held liable to the other partners for the wrongful conversion of their property. In many states statutes have been enacted prescribing the method of levy on a partner's interest in firm property, and where statutes have been passed they should be followed strictly. In some states, in the absence of a statute, it is held that a judgment-creditor can reach one partner's interest in the firm only by a proceeding in equity.

APPLICATION OF ASSETS TO LIABILITIES.

41. In the distribution of partnership assets and of individual assets for the payment of obligations of the firm and of the individual members thereof, it may be said as a general rule that partnership assets are first applied to the payment of partnership debts, and assets of individual partners to the payment of individual debts.

A creditor of a partnership, as such, has no lien upon the partnership property. In order to secure a lien, it is necessary for him to proceed in the regular way in a court of law and obtain a judgment against the firm. In equity, however, the creditors of the firm have what is sometimes

called a lien for the purpose of having the partnership property applied to the payment of the partnership debts. This lien is based upon the partner's lien, so called, which is the right of each partner to have the partnership property applied to the payment of the partnership debts, and in equity the rights of partnership creditors are subrogated to this right of the partners.

It has already been stated that the individual creditors of a partner must limit their actions against the partnership property to the interest of the debtor in the firm; and inasmuch as that interest is merely the right to a share of the surplus, after the payment of partnership debts, it follows that the claims of individual creditors are subordinate to those of the partnership creditors where partnership assets are involved (See Appendix B, Case No. 124); and in such a case a partner who is a creditor of the firm will receive payment of his claim before the individual creditors of his co-partners are paid. (See Appendix B, Case No. 125.)

In the application of individual assets, however, the individual creditors share first; and if there is any surplus remaining after the payment of the partner's individual debts, it may be applied to the payment of the partnership debts. There are several apparent exceptions to this rule, one of which exists when a partner fraudulently converts partnership property to his own individual use without the consent of the other partners, in which event the partnership creditors are allowed to participate in the distribution of the separate property to the extent of the amount fraudulently withdrawn.

Where a partnership has been adjudged a bankrupt, the application of partnership assets and of individual assets is directed by the Federal Bankruptcy Act, which provides that "the net proceeds of the partnership shall be appropri-

ated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership." An example will illustrate:

A and *B* are partners in a bankrupt firm. The partnership assets are $4,000 and its liabilities $10,000. *A*'s individual assets are $6,000, and his individual liabilities $9,000. *B*'s individual assets are $2,000, and his personal liabilities $2,000. Applying the above rule, it will be seen that the partnership creditors will receive 40% of their claims; that the individual creditors of *A* will receive 66⅔% of their claims and the individual creditors of *B* will be paid in full.

If, however, the individual assets of one partner exceed his individual or personal debts, a different situation arises. Let us suppose that the assets of the firm of *A* and *B* are $6,000, and its liabilities $8,000; that the personal assets of *A* are $6,000, and his personal debts $5,000, and that the personal assets of *B* are $2,000, and his personal debts $3,000. In this event *A*'s creditors would receive payment in full, and the excess, amounting to $1,000, would be added to the partnership assets and applied to the payment of the partnership debts. The firm creditors would then receive 87½% of the amount of their claims, and *B*'s individual creditors would receive 66⅔% of their claims.

As long as any one partner has enough individual property to pay all of the firm debts, it cannot properly be said that the firm is bankrupt, for each partner is liable for all of the partnership debts. The Federal Bankruptcy Act provides that "In the event of one or more, but not all of the

members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt."

Thus, *A* and *B* are the members of a partnership with assets amounting to $6,000, and liabilities of $10,000. *A*'s personal assets are $6,000, and his liabilities are $8,000. *B*'s personal assets are $8,000, with no personal liabilities. *A*'s creditors would receive 75% of their claims and the firm creditors would receive the full amount of their claims as *B* is not insolvent. In such a case *A*'s interest in the partnership would be a liability instead of an asset; but if the partnership assets exceed the liabilities still another situation arises.

Thus, *A* and *B* are members of a partnership with assets amounting to $8,000, and liabilities of $6,000. *A*'s personal assets are $6,000, and his personal debts are $4,000. *B*'s personal assets are $2,000, and his personal debts are $4,000. The firm creditors would receive payment in full and the surplus, amounting to $2,000, would be divided equally between *A* and *B* according to their respective interests in the firm. Let us assume that *A* and *B* have equal interests in the partnership. In that event *B* would receive $1,000, making his total assets $3,000. *B*'s creditors would then receive 75% of their claims, and of course, *A*'s creditors would be paid in full.

CHAPTER VII.

DISSOLUTION OF A PARTNERSHIP.

42. Causes of Dissolution.
43. Dissolution by Act of the Parties.
44. Dissolution by Operation of Law.
45. Dissolution by Judicial Decree.

CAUSES OF DISSOLUTION.

42. The partnership relation may be terminated by:

The act or acts of the parties.
Operation of law.
Judicial decree.

A termination of the partnership relation may be effected by the act of the parties. If, for example, the partners agree to dissolve, they have a perfect right to do so. The relation was created by contract and there is no good reason why the partners cannot terminate that relation by a subsequent agreement. In certain cases the law will operate to terminate the relation. If one of the members of a law firm is elected to the bench and the law prohibits the practice of law by judges, the firm will be dissolved by operation of law, as the continued existence of the firm would be unlawful. A third method of dissolution is by judicial decree, which is, in one sense, a dissolution by operation of law. If one partner has been guilty of misconduct so as to render it impracticable to continue the business, the court will decree a dissolution. The three causes of dissolution will be considered in the order named.

DISSOLUTION BY ACT OF THE PARTIES.

43. The partners may have originally agreed to dissolve the firm at a fixed time. In the absence of any subsequent agreement to the contrary, the relation will terminate at that time.

Where the partnership is for a fixed term, it is generally held that a partner has the power to dissolve the firm by withdrawal, but not necessarily the right so to do.

If a partnership is not for a fixed period of time, one member may cause a dissolution by withdrawing at any time.

A partnership for a fixed term may be dissolved by mutual consent at any time.

A partnership will be terminated by the accomplishment of the object for which it was formed.

Where the members of a partnership have agreed in the articles of co-partnership to dissolve the firm at a definite time, the relation will terminate at that time, unless the partners subsequently agree to continue the business after the expiration of the fixed period, an agreement which, in effect, creates a new partnership.

Where the firm has been created for a fixed term, it may be said as a general but not as a uniform rule of law, that a partner has the *power* to dissolve the partnership by withdrawal, but not necessarily the *right* to do so. A person has the *power* to break any contract, but if the violation is not justified, he is liable in damages for a breach of contract. So in a partnership if one member of the firm exercises the power without the right he subjects himself to liability for a breach of contract, because he has broken his contract with his co-partners.

If the time of duration of the partnership has not been fixed, one member may cause a dissolution by withdrawing

at any time. If the articles of co-partnership provide for giving notice of his intention to withdraw, he should do so within the specified time.

If all of the partners agree to dissolve the firm at a given time, they may do so regardless of any prior agreement concerning the manner, cause or time of dissolution. This rule is based upon the well known principle of contract law that all of the parties to a contract may alter or terminate their contract by mutual agreement at any time without any liability to each other.

If a partnership has been formed expressly for the performance of certain work, it will be terminated upon the completion of that work. If *A* and *B* have formed a partnership for the construction of certain bridges, the relation will be terminated upon the accomplishment of that object.

DISSOLUTION BY OPERATION OF LAW.

44. In the absence of an agreement to the contrary, the death of one partner dissolves the firm.

The insanity of a partner does not, as a general rule, dissolve the partnership, although it may be sufficient ground for a dissolution by a decree of court.

Bankruptcy of one partner causes a dissolution of the firm.

If partners are residents of different countries and war is declared between those countries, the partnership will be dissolved, or at least suspended during the continuance of the war.

The death of one partner operates as a dissolution of the firm. Inasmuch as the partnership relation is a personal one, each partner having the right to choose his co-partners *(delectus personarum)*, the continuance of the firm after the death of one partner would be a violation of that right. The surviving partners are not obliged to accept the heirs,

assignees or personal representatives of a deceased partner as members of the firm. If the surviving partners agree with the representative of the deceased partner to continue the business, it is, in effect, a continuance of the partnership although it actually is a new firm.

In one or two states it has been held that when one partner is adjudged insane the firm is thereby dissolved, but the majority of the courts have held that the insanity of a partner does not of itself dissolve the firm, although it may be ground for a dissolution by judicial decree.

Bankruptcy of one partner will cause a dissolution of the partnership for the reason that the bankrupt partner's interest in the firm must be ascertained and his interest in the surplus must be applied to the payment of his debts. The inability of one partner to pay his debts as they fall due does not of itself dissolve the firm, as such a partner's assets may exceed his liabilities.

If a partnership requires the conduct of business between two countries, and war is declared between those countries, the partnership relation is dissolved, or at least suspended, at the time of the declaration of war. In such a case the character and requirements of the business, and not the citizenship of the partners, is the test.

Thus, if a partnership is formed between two citizens of the United States for the purpose of importing goods from a European country, and one of the partners becomes a resident of such country, and war is declared between the United States and the country from which importations are being made, the partnership and the enforcement of all rights thereunder would be at least suspended. A continuation of the business would necessarily require commercial intercourse with a hostile country, and such intercourse is illegal.

The misconduct of one partner does not of itself dissolve the partnership, but it frequently affords ground for a judicial dissolution.

Under the common law the marriage of a female partner effected a dissolution of the firm; but under most of the modern statutes the disability has been removed. The rule as to disability varies in the different states. In Illinois, for example, a married woman is not permitted to enter into or carry on a partnership business without the consent of her husband, unless her husband has abandoned or deserted her, or is idiotic or insane, or is confined in the penitentiary.

DISSOLUTION BY JUDICIAL DECREE.

45. A court of equity may decree a dissolution of the partnership if—

Fraud was committed in the formation of the partnership.

One of the partners has become incapable of performing his duties as a partner.

One of the partners has been guilty of misconduct.

Serious dissensions arise which prevent the successful operation of the business.

If one of the members of a firm practiced a fraud on his co-partners in the formation of the partnership, a court of equity will usually grant a rescission of the partnership agreement, which, in effect, amounts to a declaration that a partnership never existed.

Thus, *A* and *B*, operating a machine-shop, induced *C* to become a partner, representing to *C* that the concern made a net profit during the previous year amounting to $9,000. *C*, relying upon their representation, was induced thereby to join the firm. Later, upon the examination of the firm books, *C* discovered that the firm had lost money during the year in question, and that many debts were still unpaid. The court decreed a rescission of the contract, ordering *A* and *B* to repay to *C* his contributions and indemnifying *C* against all of the debts and liabilities of the firm.

Fraud in the formation of a partnership, or fraud committed by one partner in the transaction of the firm business, will usually constitute grounds for a judicial dissolution. Likewise the insanity or incapacity of a partner will ordinarily justify a court in decreeing a dissolution.

Misconduct of a partner often affords ground for a dissolution; but the rule is not without its exceptions. The misconduct must be of such a character as to render it decidedly injurious to the partnership business. If it consists of repeated wilful violations of the partnership agreement, or if it threatens the solvency of the firm, a dissolution will be decreed; but if it is merely an occasional error of judgment or a minor violation of the articles, the court will not dissolve the firm. Thus, where the articles contained a prohibition against a partner guaranteeing the obligations of others, and one of the partners but once during a period of more than eight years guaranteed an obligation, and that a small item, the act did not afford ground for dissolution.

Occasional dissensions of partners will not warrant a judicial dissolution of the firm; but if the disagreements are frequent and of such a character as practically to prevent the successful conduct of the business, the court is justified in dissolving the partnership.

CHAPTER VIII.

SETTLEMENT AND ACCOUNTING ON DISSOLUTION.

46. When Caused by Death of a Partner.
47. Powers of Surviving Partners.
48. Continuance of the Firm Business.
49. Dissolution for Other Causes.
50. Rights, Powers and Duties after Dissolution.
51. Notice of Dissolution.
52. Application of Assets to Liabilities after Dissolution.
53. Settlement and Accounting among the Partners.

WHEN CAUSED BY DEATH OF A PARTNER.

46. When the firm is dissolved by the death of one of its members, it is the right and the duty of the surviving partners to wind up the business of the partnership, and they are entitled to the exclusive possession and control of the partnership property for that purpose.

Upon the death of one member of a partnership the survivors are entitled to the exclusive possession and control of the partnership property for the purpose of settling the firm affairs; and the personal representatives of the deceased member have no right to interfere with the actions of the surviving partners, unless the latter have been guilty of mismanagement, or have failed to settle the affairs within a reasonable time, in which event a court of chancery will usually appoint a receiver to perform the usual duties of the surviving partners.

POWERS OF SURVIVING PARTNERS.

47. As a general rule the surviving partners have authority to do all acts necessary and incident to winding up the partnership affairs.

The surviving partners have the power, and it is their duty, to carry out all firm obligations existing at the time of the dissolution. (See Appendix B, Case No. 126.) Thus, if *A* and *B* as partners are in the business of building houses, and, after having contracted to build a house for *C*, one of the partners dies, it is the duty of the surviving partner to complete the contract. But the surviving partners have no implied power to execute new contracts, or to create new obligations for the firm, except where such acts are necessary to wind up the business properly.

For the purpose of closing up the affairs of the firm as expeditiously as possible, a surviving partner has the power to collect and to adjust claims, to receive payment of accounts receivable, and to give receipts therefor, to execute short-term leases, if necessary, and to dispose of any part or all of the firm property for the purpose of applying the proceeds thereof to the payment of partnership debts. He may mortgage or pledge firm property to secure the payment of a partnership debt; and it has generally been held that he may make an assignment of the partnership assets for the benefit of creditors.

Title to the partnership real estate usually passes according to the law governing real property. If the title was in the deceased partner before his death, a court of chancery will regard the heirs of the deceased partner as trustees for the benefit of the surviving partners and others interested in the partnership assets. If the partnership personalty is insufficient to meet the firm obligations, a court of equity will treat the realty as personal property until the partnership

debts have been paid, after which the realty will resume its character as real estate, and the general rules governing real property will again apply.

It must be remembered that the surviving partner, in closing up the affairs of the firm, must act in absolute good faith toward his co-partners and the representatives of the deceased partner. A surviving partner is not permitted to use the partnership property for his own benefit. He is liable to the estate of the deceased partner for losses caused by his bad faith or by his lack of due diligence in winding up the firm's affairs. In the absence of an express agreement, he is not entitled to compensation for services rendered in collecting the partnership assets and applying the same to the payment of partnership debts. Ordinarily he should not be charged with interest on funds or property remaining in his hands, if he uses due diligence in performing his duties as a surviving partner. On the other hand the representatives of the deceased partner are liable to the surviving partners for partnership funds collected and misappropriated by the decedent or by his representatives; and if a surviving partner is forced to pay a partnership obligation out of his individual assets, he is entitled to contribution from the decedent's estate for that partner's share of the losses. (See Appendix B, Case No. 127.)

Creditors of a partnership which is dissolved by the death of one of its members have the right to proceed against the surviving partner or to file claims against the estate of the deceased partner. In the latter case, however, it has been held, in most jurisdictions, that the individual creditors are entitled to priority in the distribution of the separate property of the decedent, and the partnership creditors are entitled to priority in the distribution of the deceased partner's interest in the firm.

In many states, laws have been passed prescribing the method of settlement of partnership accounts where a dissolution is caused by the death of one partner. Such laws usually preclude settlement of such estates in any other way, and the statutory provisions must then be followed strictly. Some laws enumerate the powers, rights, duties and liabilities of the surviving partners with great particularity, while others merely provide that the surviving partners shall give a bond to secure the faithful performance of their duties.

CONTINUANCE OF THE FIRM BUSINESS.

48. If the surviving partners continue the firm business without authority, they will be liable for losses incurred and they will be held accountable to the representatives of the decedent for profits earned.

The right to continue the use of the firm name is generally considered a part of the good-will, and as such, it is a part of the partnership assets. The surviving partners are usually held accountable for its use.

If no provision has been made either in the articles of co-partnership or in the decedent's will for a continuance of the firm business, the surviving partners have no authority to do any partnership business other than that which is necessary to wind up the affairs of the firm. If the surviving partners do continue the firm business, they are chargeable with all losses caused thereby. However, the partners may agree that the death of one partner shall not operate as a dissolution of the firm, in which event the firm business will continue; and if the articles of co-partnership are binding upon the personal representatives of the deceased partner, and if they direct such representatives to enter the firm, a failure or refusal so to do will subject the decedent's estate to a liability for damages for a breach of the partnership agreement.

While the survivor has no right, in the absence of an agreement, to continue the business of the firm, it is not uncommon for the survivor to proceed with the business as if nothing had happened, mingling the assets of the firm with his own. In that event, all of the assets are subject to the claims of firm creditors, and all profits earned by a survivor, while acting in that capacity, must be divided with the decedent's estate; but if there are losses instead of profits, they must be borne by the survivor alone. However, if one of the survivors confines his work to the acts necessary in winding up the business, while the other continues the firm business without authority, only the latter will be liable for such losses.

The right to continue the use of the firm name has generally been considered a part of the good-will. The good-will is a part of the assets of the firm; and inasmuch as all of the assets of the firm must be accounted for by the survivors, it follows that the survivors are obliged to account for the use of the firm name if the name has any value. Special statutes have been passed in some states covering this point. It has been generally held that if the surviving partners continue the use of the firm style without authority, the estate of the deceased partner will not be subjected to any liability therefor, even though the name of the deceased partner appears in the firm name.

DISSOLUTION FOR OTHER CAUSES.

49. When a partnership is dissolved by act of the parties, generally all of the partners take an active part in closing the firm's affairs.

When dissolution of a partnership is caused by the death of one of its members, the power to administer the partnership affairs is vested in the survivors. When the dissolution

is caused by the bankruptcy or insolvency of one partner, that power belongs to the solvent members. The Federal Bankruptcy Act provides that "Such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt." When a partnership is dissolved for other causes, it is customary for all of the partners to take an active part in winding up the firm's business. In such cases the rights, powers, duties and liabilities are not identical with those of surviving partners, or liquidating partners, and for that reason they are considered separately.

RIGHTS, POWERS AND DUTIES AFTER DISSOLUTION.

50. As a general rule the dissolution of a partnership, regardless of the cause of dissolution, terminates the implied powers of the partners, with the exception of those powers which are necessary to wind up the affairs of the firm.

The dissolution of a partnership does not relieve the partners of liabilities existing at the time of dissolution, nor does it deprive them of any right to collect debts due to the firm at that time; but the powers of the partners are very materially affected thereby. In the absence of an agreement to the contrary, each partner is entitled to take part in the administration of the firm's affairs. Each partner has the authority to collect debts due the firm, and to give receipts therefor. (See Appendix B, Case No. 128.) But such authority does not give the partner the right to accept securities or other property in place of money, as the partner's authority is merely that of a collecting agent. Each partner may sell the partnership assets, or may mortgage or pledge

them for the purpose of winding up the partnership business. He has the power to pay claims which are legally owing by the firm, and is entitled to contribution from his co-partners for payments so made. He has the power to perform existing partnership contracts, as the firm remains liable for all engagements which are not performed. (See Appendix B, Case No. 129.) Likewise he has authority to defend suits against the firm, as lack of such authority would diminish the partnership assets and would prejudice the rights of creditors.

After dissolution of the firm, a partner has no implied authority to make, to endorse or to renew negotiable paper in the name of the firm, even if the instrument be given in payment of a partnership debt. Such authority may be conferred, however, by previous authorization or by subsequent ratification. He has no authority to confess a judgment against the firm, nor has he the power to revive a debt which is barred by the statute of limitations. He has no authority to create new partnership obligations, nor can he make a valid assignment of partnership property for the benefit of partnership creditors.

A liquidating partner is one who has been designated and authorized by his co-partners to administer the affairs of the firm after its dissolution. Frequently the articles of co-partnership provide for a liquidating partner; but in the absence of such a provision the partners may agree, at dissolution, that one of their number shall act in that capacity. When a liquidating partner has been named, he assumes exclusive control of the partnership affairs at dissolution, and, in the absence of express authority from his co-partners, he has no more authority than he would have had if there were no liquidating partner. His appointment as such merely operates to deprive the other partners of their ordinary powers after dissolution.

A liquidating partner is not chargeable with interest on partnership funds in his possession if he settles the partnership affairs within a reasonable time; and, in the absence of an agreement with his co-partners, he is not entitled to compensation for services rendered as a liquidating partner.

NOTICE OF DISSOLUTION.

51. Upon dissolution of a partnership in any other manner than by operation of law, its members are liable for all partnership debts existing at the time of dissolution; and they continue to be liable to third persons for the acts of any partner within the scope of the business, until proper notice of dissolution has been given.

Actual notice must be given to those who previously have extended credit in dealing with the firm.

Notice by publication is sufficient as to others.

Notice need not be given to anyone having knowledge of the dissolution from any source; and, in any case, notice need not be formal.

In an ordinary partnership each member is the agent of all the other partners for the purpose of doing any acts within the usual scope of the partnership business. Third persons dealing with the firm can rely upon this apparent authority of each partner to execute partnership contracts and to transact partnership business as its agent. When a dissolution occurs the implied authority of each partner is suddenly restricted to the acts necessary in winding up the business. Third persons dealing with the firm generally have no way of knowing that a dissolution has occurred, and consequently, for their protection, the law requires that due notice of dissolution be given when such dissolution is by act of the parties. Until such notice has been given, every member of the former firm continues liable for the acts of

each of the former partners, if within the scope of the business. (See Appendix B, Case No. 130.) Of course, if a person trading with the firm has actual knowledge of the dissolution, or in law is presumed to know that fact, the rule will not apply.

A, B and *C* have been partners in the business of buying and selling shoes. *D,* an official of a wholesale shoe concern, calls upon *A* and *B* at their place of business, for the purpose of obtaining an order for shoes. He is informed by *A* that *C* has retired from the firm and that the original partnership has been dissolved. Nevertheless *D* sends a large shipment of shoes, and later attempts to hold *C* as one of the members of the firm. *C* is not liable for the reason that the wholesaler had actual knowledge of the dissolution.

A dormant partner is not obliged to give notice of dissolution to relieve himself of liability for subsequent obligations, for the reason that third persons, not knowing of his former connection with the firm, cannot claim to have extended credit to the firm after his withdrawal, in reliance on him. If his connection with the firm becomes known to anyone before his withdrawal, notice must be given to such persons.

All persons known to have had dealings with a partnership should be given actual notice of its dissolution. Others should receive notice by publication in a newspaper of general circulation. The actual notice required is usually given by mail, and such notice is in most cases sufficient, although it has been held that where the addressee does not receive the notice, he will not be charged with knowledge of the dissolution. No particular form of notice is required. In some states the method of notification is regulated by statute.

When dissolution results from operation of law, as by death of a partner or by a decree of court, there is a presumption of sufficient publicity without notice.

APPLICATION OF ASSETS TO LIABILITIES AFTER DISSOLUTION.

52. On dissolution, each member of a partnership has the right to have partnership assets applied first to the payment of partnership debts. This right is generally known as a "partner's lien."

In the application of assets to liabilities on dissolution, it may be stated as a general rule that partnership assets are first applied to the payment of partnership debts, and individual assets are first applied to the payment of individual debts. The right of a partner to compel the application of partnership assets to the payment of partnership debts, commonly known as a "partner's lien," has been fully considered in a preceding chapter, and the rules there presented will likewise apply after dissolution.

SETTLEMENT AND ACCOUNTING AMONG THE PARTNERS.

53. After the payment of partnership debts, each partner has the right to have an adjustment of accounts with his co-partners; and, after such adjustment, to have the surplus divided among them.

In the distribution of proceeds, the following order should be maintained:—

1. Payment of the debts owing by the firm to third persons.
2. Repayment of loans made by any partner to the firm, as they are partnership debts owing by the firm to its members.
3. Repayment of the capital originally contributed by each partner. Each contribution of capital is considered a debt owing by the firm to the contributing partner.
4. Division of the balance as profits.

It should be kept in mind that, in a settlement and accounting between partners at the time of the dissolution of the firm, the articles of co-partnership will be used as a guide in the settlement of all disputes. Partners may have agreed in their articles of co-partnership upon all questions of payment and distribution at dissolution; and, if such an agreement was made, it will be final, the only difficulty which may arise in such a case being the interpretation or construction of the partnership contract. Disputes arise when the articles of co-partnership do not cover all contingencies, in which case it frequently becomes necessary to appeal to a court for the purpose of determining the rights of the partners among themselves; and the rules of law stated below are based on the assumption that an agreement between the partners on these points never was made, or that the agreement, if made, did not cover the questions in dispute.

In settling a partnership estate the first consideration is the payment of partnership debts. All of the partnership property of every kind and character, including the goodwill of the firm, is included in the final accounting. If there is sufficient cash to pay all claims, it is not necessary to convert the other property into cash. After the payment of all claims to third persons, the firm should next repay any loans or advances made by each partner to the firm. After the repayment of such loans, the firm should next repay to each partner his original contribution of capital. After the repayment of capital, the surplus, if any, should be divided among the partners as profits. In the absence of an agreement to the contrary, the profits are divided equally. (See Appendix B, Case No. 131.)

Suppose *A* and *B* are partners in the grocery business. *A* contributed $8,000, and *B*, $4,000 at the time the partnership was formed. No agreement was made for a division of profits.

A subsequently loans $2,000 to the firm. On dissolution the partnership has $16,000 after the payment of the partnership debts. Of this sum *A* is entitled to $2,000, being the amount of his loan, and $8,000, the amount of his contribution to the capital, making $10,000. *B* is entitled to $4,000, being the amount of his contribution to the capital. After the repayment of *A's* loan and the contributions to capital, there remains $2,000 to be distributed as profits, which, in the absence of an express agreement in regard to the proportion in which profits were to be shared, should be divided equally between *A* and *B*.

If the total assets of the firm are not sufficient to meet its debts, including its obligations to the partners for their loans and contributions of capital, there will be losses. In the absence of an agreement to the contrary, losses are shared by the partners in the same proportion as they are entitled to share in the profits. In other words, the profit sharing ratio and the loss sharing ratio are the same. (See Appendix B, Case No. 132.)

In event of losses, each partner is entitled to repayment of that part of his contribution, if any, remaining after the payment of his share of the losses.

In the above illustration, if the partnership has $10,000 at dissolution, after the payment of firm debts, *A* would be entitled, first, to $2,000, the amount of his loan to the firm, and the amount remaining would be $8,000. The contributions of capital having been $12,000, the losses therefore would amount to $4,000. The loss to be borne by each partner would be $2,000. *A*, then, should receive $6,000, being $8,000 contributed less $2,000 loss. *B* should receive $2,000, being $4,000 contributed less $2,000 loss.

If the losses exceed the entire contributions to capital, the rule would be the same. That is, each partner will be entitled to repayment of that part of his contribution, if any, remaining after the payment of his share of the losses; but if a partner's share of the losses exceeds his contribution, he will be indebted to his co-partner for the difference.

If, in the same illustration, the partnership had but $1,000 on dissolution after the payment of firm debts, *A* would be entitled to the $1,000 as a creditor of the firm, and the losses would amount to $13,000, being the total amount of capital contributed, plus $1,000 remaining unpaid to *A* for his loan to the firm. The losses being divided equally, *B* would owe $2,500, being the excess of his share of the loss, $6,500, over his contribution of $4,000. *A* should receive $2,500, of which $1,000 would represent the unpaid balance of his loan, and $1,500 would represent the excess of his contribution, $8,000, over his share of the loss, $6,500.

While the foregoing illustrations may seem confusing at first, it is safe to say that no insurmountable difficulty will be encountered, if the order of payment, namely, creditors' claims, loans by partners, capital, and profits or losses, is constantly kept in mind. It should also be remembered, (1) that the profits or losses are represented by the difference between all of the assets of the firm on one side and the combined claims, loans by partners and contributions of capital on the other; and (2) that losses are shared in the same proportion as profits, and profits are shared equally, in the absence of a special agreement between the partners.

Where there are no partnership assets with which to pay the partnership debts, and one partner pays such liabilities out of his own personal funds, he has a right to compel contribution from his co-partners. (See Appendix B, Case No. 133.) In the absence of an agreement covering this point, each partner is expected to contribute equally to the payment of such debts; but, if there has been an agreement to share the profits in certain proportions, the law presumes they intended to contribute to losses in the same proportions. (See Appendix B, Case No. 134.) If any partner be a non-resident or be insolvent, the resident and solvent partners are required to contribute the entire amount, but

they have in turn a right of action for reimbursement from such partners as are non-resident or insolvent.

Where a partner is indebted to the firm on dissolution, this obligation should be paid by him at once. If not paid, it should be treated as a partnership asset, and on the final settlement it should be deducted from his share. It is generally held that when a partner overdraws his account, he should be charged with interest on the amount overdrawn; and that when a partner makes a loan to the firm, he should receive interest thereon. (See Appendix B, Case No. 135.) While interest is chargeable on loans and overdrafts, it has been generally held that a partner is not entitled to interest on his contribution of capital even though such contributions are unequal, unless there has been a special agreement therefor.

APPENDIX A.

FORM FOR CO-PARTNERSHIP ARTICLES.

THIS AGREEMENT, Made this twenty-fifth (25th) day of November, A. D. 1916, by and between Robert R. Simpson of Chicago, Cook County, Illinois, Joseph E. Gridley, of Chicago, Cook County, Illinois, and James Monahan, of Wheaton, Du Page County, Illinois, WITNESSETH:—

1. The parties hereinbefore named have agreed to become co-partners in business, and by these presents do agree to be co-partners, for the purpose of conducting a retail boot and shoe business in the City of Chicago, County of Cook and State of Illinois; upon the terms hereinafter set forth.

2. The firm-name shall be "Simpson, Gridley & Monahan," and all business conducted by the partners, or any one of them, for or in behalf of the firm, shall be in the firm name.

3. The partnership shall commence on the twenty-sixth (26th) day of November, A. D. 1916, and shall continue for a period of five years, ending with the twenty-fifth (25th) day of November, A. D. 1921.

4. The contributions of each of said partners to the capital of the firm are as follows:—

Robert R. Simpson has contributed the sum of three hundred dollars ($300.00) in cash, and a lease of the store at 4615 Broadway, in said City of Chicago, to be occupied by the firm as the place of business. The value of said lease has been estimated and appraised by the parties at the sum of twenty-seven hundred dollars ($2,700.00).

Joseph E. Gridley has contributed the sum of one thousand dollars ($1,000.00) in cash, and the stock of goods and good-will of the business heretofore carried on by him at the above location, which stock of goods and good-will have been estimated and appraised by the parties at the sum of two thousand dollars ($2,000.00).

James Monahan has contributed the sum of fifteen hundred dollars ($1,500.00) in cash.

It is understood that the capital so contributed shall be used and employed in common between the parties hereto for the support and management of the said business, to their mutual

benefit and advantage. The contributions of each partner shall not be diminished or increased at any time during the term of the partnership without the consent of all partners.

5. At all times during the continuance of the partnership, Robert R. Simpson and Joseph E. Gridley shall devote their entire time and attention to the business of the firm. James Monahan shall give such time and attention as he can to the said business, which shall not be less than two (2) hours of each business day.

Each partner shall use his utmost endeavors to promote the interests of the firm, and exercise the utmost skill and power for the joint interest, profit, benefit and advantage of the members thereof.

The parties hereto shall have the entire management of the firm business, including the exercise of the power of engaging and discharging employees; and any disputes among the partners as to the management of the firm business shall be decided by a majority of them; and an act by one partner contrary to the express wish of the majority shall be a violation of the terms of this agreement.

The said Joseph E. Gridley shall have entire charge of the purchase of stock and equipment for the firm, and the other partners shall not make any purchases for the firm without the express consent of all partners.

The said Robert R. Simpson shall have the exclusive power to draw checks or bills and make notes or accept drafts for the firm; and no partner shall have power to bind the firm as security for third persons, without the express consent of all of the members of the firm.

6. No partner shall engage in any business which might in any way interfere with the business of the firm; but each partner shall be permitted to become interested in another business of the same or similar character, provided such business is not within the City of Chicago, and provided it shall not be inconsistent with any of his duties and obligations under this contract.

Any partner supplying his personal needs from the stock of this firm shall pay for the same in the same manner as third persons dealing with the firm.

7. It is agreed by and between the said parties that there shall be had and kept, at all times during the continuance of their partnership, perfect, just and true books of account, similar to those which are usually kept in any well regulated business of a similar character and size; and each partner shall cause to be entered upon the said books a just and true account of all transactions for or on behalf of said firm. The books of account shall be kept in a safe place at the regular place of business of the firm, and shall not be removed from that place without the express consent of all partners. Each partner shall have the right to inspect the books of account of the firm at all reasonable times.

8. On the first business day of January of each year a complete inventory of the partnership assets shall be taken, and at that time a written statement of the financial condition of the firm shall be prepared. Upon the presentation of the written statement of the financial condition of the firm, an accounting by the partners shall be had, and the profits or losses of the previous year shall then be divided as hereinafter agreed.

9. The said Robert R. Simpson and Joseph E. Gridley shall each be entitled to draw the sum of thirty dollars ($30.00) at the end of each week; said James Monahan shall be entitled to draw the sum of twenty dollars ($20.00) at the end of each week. At any annual accounting, the sums so drawn by the several partners shall be charged to them, and be considered a part of their share in the profits. If the amount drawn by any partner exceeds his share of the profits, he shall immediately repay the deficiency to the firm.

Any advances or loans by the partners to the firm shall bear interest at the rate of five per cent. (5%) per annum until paid; and any loans or advances made by the firm to a partner shall bear interest at the rate of five per cent. (5%) per annum until paid.

10. All gains, profits and increases, that shall come, grow or arise from or by means of their said business, shall be divided among the said partners in manner following:—

Robert R. Simpson, three-eighths (3/8).

Joseph E. Gridley, three-eighths (3/8).

James Monahan, one-fourth (1/4).

Losses, if any, are to be shared as follows:—

Robert R. Simpson, four-ninths (4/9).
Joseph E. Gridley, four-ninths (4/9).
James Monahan, one-ninth (1/9).

11. In the event of the death of any partner, the partnership shall at once be dissolved. Any partner can dissolve the firm at any time by giving five (5) months' written notice to each of his co-partners.

12. In the event of the dissolution of the partnership before the expiration of the partnership term, either by the voluntary or involuntary withdrawal of a partner as hereinbefore provided, the partners remaining are hereby granted the right to purchase the interest of the withdrawing partner by the cash payment of a sum equal to the value of his contribution, with interest thereon from the time of the last accounting to the date of payment, at the rate of six per cent. (6%) per annum. If the remaining partners are unable to agree in regard to the purchase of such interest, it shall be sold to the partner willing to pay the highest sum therefor. In that event the purchasing partner shall be entitled to all of the rights of the withdrawing partner, and he shall also assume and agree to pay all liabilities which the withdrawing partner would have been compelled to pay under the terms of this agreement, had his interest in the firm continued until the expiration of the period for which the partnership was formed, provided, however, that the purchasing partner shall have no right to withdraw that share of the profits to which the withdrawing partner would have been entitled to, had he remained a member of the firm, and further, that the purchasing partner and his remaining co-partner shall have an equal share in the management of the business. Upon the purchase of the interest of a withdrawing, deceased or bankrupt partner, that partner or his personal representatives, as the case may be, shall execute and deliver to the purchaser or purchasers, a proper conveyance of all of his right, title and interest in said business. If no partner desires to purchase said interest within four months after the withdrawal or death of a partner, and the partners remaining desire to continue the business of the firm, the value of such interest shall then be paid in cash by the firm to him or to his personal representatives at once.

If the rights herein granted to the remaining partners are not exercised within the specified time, such interest may be sold to anyone.

On the retirement, death or bankruptcy of a partner, the right to use the firm name and the good-will of the firm shall remain with the partners continuing the business of the partnership.

13. Upon the retirement, death or bankruptcy of a partner, the purchaser of that partner's interest shall make suitable arrangements for the protection of said partner or his personal representatives, against any liability for partnership debts existing at the time of such purchase, by agreeing to indemnify said partner or his personal representatives for any loss or losses resulting by reason of enforced payment of any such debts.

14. Upon dissolution of the firm, due notice of that fact shall be given to all persons having previously dealt with the firm, and all others, as provided by law. All of the firm assets, including its good-will, shall be sold and the proceeds thereof shall be applied in manner following:

(1). Payment of the firm debts owing by the firm to third persons.

(2). Repayment of loans made by the partners to the firm, together with interest thereon, as provided in this contract.

(3). Repayment of contributions of capital to each partner.

(4). Divisions of the balance, if any, as profits.

15. If the partnership hereby created continues to do business after the twenty-fifth (25th) day of November, A. D. 1921, without any new partnership agreement, it is understood that the terms of this agreement shall remain in full force and effect.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals this twenty-fifth (25th) day of November, A. D. 1916.

ROBERT R. SIMPSON, (SEAL)
JOSEPH E. GRIDLEY, (SEAL)
JAMES MONAHAN. (SEAL)

FORM FOR NOTICE OF DISSOLUTION.

(To be published in a newspaper of general circulation, and also delivered to all previous creditors of the firm.)

You are hereby notified that the co-partnership heretofore existing between Robert R. Simpson, Joseph E. Gridley and James Monahan, under the firm name and style of Simpson, Gridley & Monahan, doing business at 4615 Broadway, Chicago, Cook County, Illinois, has this day been dissolved by agreement of the partners. (The following may be added, but it is not necessary): Robert R. Simpson and James Monahan have this day retired from the said firm and business; Joseph E. Gridley has purchased the right to use the firm name, together with the good-will of the firm, and all of its assets, and he will continue the business at the same location under the same firm name.

Dated, Chicago, Illinois.

November 26, A. D. 1921.

ROBERT R. SIMPSON,
JOSEPH E. GRIDLEY,
JAMES MONAHAN.

APPENDIX B.

ILLUSTRATIVE CASES—Continued from page 517.

CASE No. 106.

SMITH *v.* TARLTON AND FINLEY.

(1847), 2 Barbour's Chancery Repts. 336.

Facts: Smith made an oral agreement with Tarlton and Finley under the terms of which the contracting parties entered into a partnership to continue three years, its object being to purchase a water privilege and a site for a foundry, to erect an iron foundry or furnace thereon; and to carry on the business of manufacturing iron castings, etc., and each of the co-partners was to contribute a certain amount of money to the capital of the firm. All this was done, and the foundry business was carried on by the firm until August, 1846, when the foundry was sold and the co-partnership dissolved by mutual consent. Shortly afterwards Smith filed a bill in chancery asking for an accounting and settlement of the affairs of the co-partnership, which had existed and been carried on between himself and Tarlton and Finley; and in the said bill he asked for an injunction restraining Finley, whom he alleged in this bill to have

misapplied the funds, from selling, disposing of or intermeddling with the co-partnership effects. An injunction having been granted against Finley, this proceeding was an application to dissolve the injunction upon the matter contained in the bill only.

Argument of Defeated Party (Tarlton and Finley): Smith could not enforce the co-partnership agreement against them for the reason that it was a contract created to continue for a longer term than one year, and such agreements, to be enforceable, are required by the statute of frauds to be in writing.

Law Applied (Opinion delivered by The Chancellor, New York): The misapplication of the co-partnership funds and other violations of duty in relation to the books, property and effects of the firm by the defendant Finley, appear to make a proper case for the granting of an injunction against him. There is no force in the objection raised by the defendants to the oral agreement of co-partnership. This was not an agreement which was *not* to be performed within one year, so as to require it to be in writing, under the statute of frauds, but it was the formation of an immediate partnership between the parties, which partnership was to continue three years unless sooner dissolved by the consent of the parties. In this state, no written articles are necessary to constitute a co-partnership which is to take effect immediately, although a written agreement might be necessary to bind the parties to enter into a future co-partnership to commence after the expiration of a year, but even where there was an oral agreement to enter into a co-partnership at a future day, specifying the terms of such co-partnership, if the parties went into a co-partnership at the prescribed time, without agreeing upon any new terms, the former oral agreement would be presumed to constitute the terms upon which such partnership was entered into and carried on. The motion to dissolve the injunction must therefore be denied.

CASE No. 107.

EMERY *v.* WILSON.

(1879) 79 N. Y. 78.

Facts: In October, 1865, Emery, Simpson and Wilson entered into a partnership, and it was agreed in the articles of co-partnership that the partnership should continue "for so long a time as they shall mutually agree thereto." Emery was to receive one-tenth share of the profits, Simpson five-tenths, and

Wilson four-tenths. The partnership continued until the death of Simpson in October, 1873. In 1872 a new agreement was made relative to the division of profits, whereby Emery was to receive 18%, Wilson 32% and Simpson 50% of the profits. Emery evidently becoming dissatisfied with the division of profits, Wilson, on January 1, 1873, gave him the following paper:—

"New York, January 1, 1873.

"I hereby agree to pay to Mr. James W. Emery, four and three-eighths per cent. of the net ascertained profits of the existing firm of John T. Wilson & Company, as the same may be during the year 1873.

"John T. Wilson."

Emery died a few years after 1873, and this suit was brought, by the executrix of his estate, upon the instrument above set forth, to recover the amount involved therein, Emery having remained a partner for some time after the year 1873.

Argument of Defeated Party (Wilson): In order to sustain an action on the agreement made by Wilson, extrinsic evidence of a consideration must be produced by the plaintiff.

Law Applied (Opinion delivered by Judge Danforth of the N. Y. Ct. of App.): The writing on which this action is brought amounts to something more than a naked promise on the part of the person signing it. It indicates a contract having the consent of Wilson and Emery to the stipulations expressed in or to be fairly implied from it. Although signed by Wilson only it was accepted by Emery and its cause or consideration sufficiently appears. It is dated January 1, 1873, refers to the firm of John T. Wilson & Company as then existing, and the undertaking on the part of Wilson could become operative only by its continuance, for it is according to the sum of profits of the firm, as ascertained during that year, that Emery is to be paid. He was under no obligation to remain in the firm, and it is not unreasonable to infer that Emery consented to continue a member of the co-partnership in consequence of Wilson's promise, and that the promise of Wilson was made to induce that consent. There was then the reciprocal agreement between the parties. This view is strengthened by the fact that from the time of this contract Emery did remain in the firm, and Emery received from the firm business a larger share of profits than he had received during the year 1872, and Wilson received less. Some agreement must have led to this change, and the fact itself throws light upon the contract, indicates a connection between it and the result referred to, and a sufficient inducement for Wilson's promise.

CASE No. 108.

BEECHER *v.* BUSH.

(1881) 45 Mich. 188; 7 N. W. 785; 40 Am. Rep. 465.

Facts: This is an action by Bush to charge Beecher as a partner of Williams, for a bill of supplies purchased for the Biddle House, a hotel in Detroit. Beecher was the owner of the hotel, and Williams proposed in writing to "hire the use" of it from day to day, and to operate it as a hotel. Beecher accepted the proposal of Williams, who entered the house and commenced business, and in the course of business made the purchase in question. The question submitted to the court was whether the acceptance of Williams' proposal by Beecher constituted the latter a partner in the business.

Under their arrangement, Beecher was to have a sum "equal to one-third of the gross receipts and gross earnings," for each day. It was admitted that Beecher was never held out to the public as a partner, and that the parties never intended to form a partnership in the hotel business. The evidence further shows that Beecher did not understand that his credit was to be in any way involved in the business, or that he was to have any interest or ownership in any supplies which were bought, or any privilege to decide upon such supplies, or any legal control over the business, except in the division of proceeds, or that he was subject to any liability for losses, if any occurred.

Argument of Defeated Party (Bush): Persons who have not intended to be partners may be made partners by their acts, so far as third persons are concerned, on the theory of estoppel.

Whenever a landlord endeavors to obtain the advantages of a co-partnership, without incurring its liability, the contract will be held to be one of partnership.

Law Applied (Opinion delivered by Just. Cooley of the Supreme Ct.): Beecher never held himself out to the public as a partner, and the bill of supplies furnished by Bush was purchased on the sole credit of Williams, and charged to him on Bush's books. The question, therefore, does not involve the theory of estoppel, for the reason that Beecher has done nothing, and permitted nothing to be done, which can preclude him from standing upon his exact legal rights, as his agreement fixed them.

The plaintiff below argued that the receipt of gross earnings is "cogent evidence" that Beecher was a partner. Participation in gross returns does not of itself make one a partner. Gross

returns are not profits, and may be very large when there are no profits; and it is well settled both in England and in this country that the right to participate in gross returns is not conclusive evidence of partnership.

The elements of partnership are: Community of interest in some lawful business for the conduct of which the parties are mutually principals of and agents for one another, with general powers within the scope of the partnership business, which powers, as between the parties themselves, may be restricted by agreement.

In the case at bar there is a lawful business, namely, the keeping of a hotel. In a sense there is also a community of interest in the proceeds of the business, although all of the losses were to be borne by one only; but nowhere in the arrangement between Beecher and Williams does it appear that either party clothed the other with an agency to act on his behalf in this business. In fact Beecher had no authority to do a single act in connection with the business of the hotel, except merely the supervision of the accounts, and this was only for the purpose of ascertaining the gross returns. It would be difficult to give a set of circumstances where the element of agency is more perfectly eliminated from the arrangements of the parties, than it actually was in this case. Beecher was not to intermeddle in any way in the conduct of the hotel business so long as Williams complied with the terms of his contract. If the business was managed poorly, Beecher had no remedy whatever. While it is true that the legal intention, and not the secret mental intention of the parties, is the test of partnership, such legal intention can only be ascertained by inspection of the contract between the parties, and by a review of their acts. In this case, both the contract of the parties and their subsequent acts clearly indicated an intention *not* to be partners. Beecher and Williams were not partners, and Beecher is not liable to Bush for the bill of supplies purchased for the hotel.

CASE No. 109.

AULTMAN & Co. *v.* FULLER, WILLIAMS & Co.

(1880) 53 Iowa, 60; 4 N. W. 809.

Facts: This was an action in equity to set aside an execution sale of an undivided half of a threshing machine. The machine was owned by one Tierney and one Cook. The Fuller

Co., defendant, having obtained a judgment against Tierney, levied an execution against an undivided half of the threshing machine; and under such execution an undivided half was sold to the defendant. The Aultman Co. obtained a judgment against Tierney and Cook, and the entire machine was sold to the plaintiff under its execution. Upon discovery of the fact that Fuller & Co. had sold an undivided interest in the machine prior to the time of its sale under execution, the Aultman Co. filed this bill to set aside the prior sale, on the ground that Tierney and Cook were partners, that its claim against them was a partnership debt, and that there was no valid levy of the defendant's execution.

It appears from the evidence that Cook and Tierney bought the machine as partners; that as such they were to operate the machine; that Cook was to furnish one team and a man, and Tierney was to furnish two teams; that each was to furnish half of the work, and the profits and losses were to be divided equally.

Argument of Defeated Party (Fuller Co.): Tierney and Cook were tenants in common and not partners in the ownership of the machine.

Law Applied (Opinion delivered by Ch. Just. Adams of the Supreme Ct.): Tierney and Cook were co-owners of the threshing machine; as such they were to operate the machine, which was the only partnership property. Each was to furnish means for operating the machine and one-half of the labor, and the profits and losses of the business were to be divided equally. All of the elements of partnership were present.

The Fuller Co., as a creditor of Tierney, levied upon an undivided half interest in the threshing machine. Tierney's interest in the machine, as a partner, was not necessarily an undivided half. His interest was equivalent to such a fraction as would constitute his share in the partnership assets after satisfying all claims against the firm, whether due to third persons or to his co-partners. The Fuller Co. should have levied upon Tierney's interest in the firm, and, after a sale thereof under execution, it should have filed a bill in chancery for the ascertainment of that interest; but, even in that event, the claim of Aultman & Co. would have been superior to that of the Fuller Co. for the reason that the Aultman claim was a partnership claim and therefore entitled to priority over the claims of the individual creditors of Tierney.

CASE No. 110.

COX *v.* HICKMAN.

(1860) 8 House of Lords' Cas. 268.

Facts: Prior to the year 1849, Benjamin Smith and Josiah Smith carried on a business at the Stanton Iron Works, as iron masters, under the name of B. Smith & Son. In the fall of 1849, B. Smith & Son, becoming financially embarrassed, made an assignment to Cox, Wheatcroft and other creditors, as trustees for the benefit of all of the creditors of the firm. The deed of assignment gave to the trustees full power of management of the business, which was to be carried on under the name of "The Stanton Iron Company," with a provision that the net income of the business was to be divided among the creditors of the Smiths. Shortly after the deed of assignment, Cox and Wheatcroft resigned as trustees, but no successors were appointed, the business of the company being carried on by the remaining trustees. In April, 1855, Hickman, having sold a bill of goods to the trustees, drew bills on them which were accepted in the name of the Stanton Iron Company, by one of the trustees. Later suit was brought against the creditors as partners.

Argument of Defeated Party (Hickman): Inasmuch as the creditors shared in the profits of the business, they were liable as partners.

Law Applied (Leading opinion delivered by Lord Cranworth, of the British House of Lords): In this case the action of the creditors, or of a majority of them, was merely passive, they having assented to an arrangement whereby the business of the iron company could be carried on, with a provision that the net profits should be applied in discharge of their demands. Participation in the profits of a business does not of itself subject the participants to the liability of partners. While it is true that the right to participate in profits afford cogent evidence that the participants are partners, the *real ground of liability* is that the trade has been carried on by persons entitled to the profits, either as principals or agents. In this case the debtors have merely mortgaged the profits to their creditors. They have precluded themselves from applying them to any purpose other than the discharge of the debts; but when the debts have been fully paid, the creditors have no further interest in the business, and the debtors are entitled to all profits accruing subsequent to that time. The trade still remains the trade of the debtors,

and the debtors are the persons by or on behalf of whom it is carried on.

While it is true that the deed of assignment provided that the conduct and management of the business by the trustees could be controlled by a majority, in value, of the creditors, the grant of such a power does not alter the case, for the reason that the powers granted could have been easily exercised by the creditors had they seized the property in execution.

For the reasons stated, the creditors of B. Smith & Son were not liable as partners to Hickman.

CASE No. 111.

CHATHAM NATL. BANK *v.* GARDNER.

(1906) 31 Pa. Superior, 135.

Facts: In September, 1900, Gardner and others attempted to form a limited partnership under the provisions of the Pennsylvania statute, with Gardner as a special partner. They failed to sign, to acknowledge and to record a statement in writing in accordance with the provisions of the act. In February, 1901, an attempt was made to increase the capital from $12,000 to $30,000, but this statement was not signed by any of the partners except A. M. McClain. The name of the alleged limited partnership was "Gardner Shingle Company, Ltd." In 1902 the Gardner Shingle Company, by its secretary and treasurer, executed two notes for the sum of $215.75 each, in the following form:

"$215.75

"Ridgway, Pa., November 26, 1902.

"GARDNER SHINGLE COMPANY, LTD.

"Three months after date we promise to pay to the order of the Abbey Press, Two Hundred and fifteen and 75/100 dollars, at Elk County National Bank, without defalcation, value received.

"GEORGE A. MCCLAIN, Secretary.

"A. M. MCCLAIN, Treasurer."

In 1903 the bank brought suit against Gardner, A. M. McClain and George A. McClain as general partners.

Argument of Defeated Party (Gardner): The note, not having been signed in the name of the "Gardner Shingle Company Ltd.," was merely a personal obligation of the McClains.

Law Applied (Opinion delivered by Just. Morrison): If partners seek to have all the advantages of a partnership,

and yet limit their liability to creditors, they must comply strictly with the statute. On account of the many defects in the statements of the Gardner Shingle Company, Ltd., no limited partnership was formed, and the defendants are liable as general partners.

As to the form of the note, it is conceded that both of the McClains had been appointed managers of the Gardner Shingle Company, and that they were authorized to sign the notes. In view of the fact of authorization, and of the further fact that there is a special statute covering such cases in Pennsylvania, the note in question was undoubtedly a partnership obligation, and Gardner is liable as a general partner.

CASE No. 112.

PALMER *v.* STEPHENS.

(1845) 1 Denio, 471.

Facts: Palmer sued William G. Stephens on a promissory note payable to Palmer, which note was in the following words:—

"On demand, for value received we promise to Nathaniel Palmer, One Thousand Dollars, and interest. Coeymans, November 20, 1841.

"G. STEPHENS,
"W. G. S."

On the date of the execution of the note, there was a mercantile firm at Coeymans, composed of Gideon Stephens and his three sons, known as "G. Stephens & Sons," though sometimes known as "G. Stephens & Company." William G. Stephens, though not a member of the firm, was a clerk of the firm at the date of the execution of the note, and as clerk, was fully authorized to make notes for and in behalf of the firm, and, in several isolated cases, the name "G. Stephens" had been used as the firm name instead of "G. Stephens & Sons."

Argument of Defeated Party (William G. Stephens): The firm of G. Stephens & Sons, for whom the note was given by the defendant as their clerk, was alone liable to the plaintiff.

Law Applied (Opinion delivered by Just. Beardsley of the N. Y. Supreme Ct.): The name "G. Stephens" was written by the defendant, and he undoubtedly intended to bind some person by that signature. If no other person was bound, then the defendant was clearly liable, for the reason that if one

assumes to act as the agent of another without authority, and executes a note in his name, the assumed agent is himself bound by the signature, and a person may execute an instrument and bind himself as effectually by his initials as by writing his full name.

To relieve the defendant from personal liability it is necessary to show that he had authority to sign the name "G. Stephens," and thereby to bind the firm. If the use of the name "G. Stephens," had been assented to and had been used by the members of the firm as a name to designate the firm in the transaction, and the defendant was authorized to use that name, then the firm is liable on the note. In this case, however, there is but slight evidence to show that defendant had such authority, and therefore the firm of G. Stephens & Sons could not be held for the unauthorized execution of the signature "G. Stephens."

CASE No. 113.

SHEA *v.* DONAHUE.

(1885) 83 Tenn. (15 Lea), 160; 54 Am. Rep. 407.

Facts: In March, 1887, Shea and Donahue entered into a partnership agreement, under the terms of which they agreed to become partners as merchants in making, buying and selling tinware, stoves, pumps and other similar articles, in the city of Knoxville, Tenn., for the term of one year from date thereof, under the firm name of Shea & Donahue. Shea contributed as capital $1,000 and Donahue contributed his experience, agreeing to give the business his entire personal attention to place against the cash furnished by Shea.

They agreed to bear the expenses and losses and to share the profits equally. The partnership continued for a period of about three years, after which Shea filed a bill for a partnership accounting.

Argument of Defeated Party (Donahue): Property brought into the partnership business by the members of the firm or bought with capital advanced becomes partnership property, and by the terms of the agreement Donahue was entitled to one-half of the profits of the business, and to one-half of the cash capital advanced by his co-partner.

Law Applied (Opinion delivered by Just. Cooper of the Supreme Ct.): If the articles of co-partnership had provided for an equal division of all of the assets upon dissolution, notwithstanding an unequal contribution of capital by the

partners, the contention of the defendant would be correct; but, in the absence of an express agreement, a contribution to capital is considered in law an obligation of the firm to the contributing partner, which obligation is paid after the payment of partnership liabilities to third persons and of partnership liabilities to partners for loans or advances. In this case, before any profits are divided, Shea is entitled to repayment of his $1,000 contribution to capital which he made at the time of the formation of the firm. If anything remains after the payment of firm debts to third persons and of loans or advances made by either partner, and after the payment of contributions of capital, the ultimate residue will be divided equally in accordance with the partners' agreement.

CASE No. 114.

WOLF *v.* SELLING.

(1893) 25 N. Y. Supplement, 963.

Facts: Wolf and Ida Selling were partners, under the firm name of Selling & Company, wholesale liquor dealers. A receiver was appointed to take over the partnership property, and the court entered an order requiring Selling to deliver to the receiver a liquor license under which the firm did business. The license was issued to Ida Selling but was paid for with the money of the firm.

Argument of Defeated Party (Selling): Inasmuch as the defendant is liable for any violation of the license, it would be unfair for the receiver to take it. The license is merely an individual right and not property.

Law Applied (Opinion delivered by Judge MacAdam of the Superior Ct. of N. Y. City): The license was evidently paid for by the firm with its money. It was used by the firm, and the business could not be carried on without it. The license was the property of the firm and it should be turned over to the receiver.

CASE No. 115.

BOPP *v.* FOX.

(1872) 63 Ill. 540.

Facts: Bopp, Weaver, Schuchman and Burmeister entered into an oral agreement to carry on a milling business, with the understanding that articles of co-partnership would be

drawn later, which was done about two months afterwards. In pursuance of their oral agreement, they at once purchased the land on which to erect a flouring mill, for the sum of $3,000 cash, the balance to be paid about six weeks later. Each paid a proportionate part of the purchase price, and on the first payment each paid $750. The deed was made to them in their individual names. About a month after the purchase they commenced building the mill, each partner contributing to the payment for the mill as the building progressed. The mill was completed at a cost of about $40,000, after which a milling business was conducted for some time, and later the court decreed a dissolution for the firm at a time when its liabilities exceeded its assets by about $12,000. The property was sold at a receiver's sale under order of court to Fox. In the meantime Bopp died, and his widow filed a petition for the assignment of her dower.

Argument of Defeated Party (Catherine Bopp): No partnership was in existence at the time of the purchase of the property, and the mill was the individual property of the copartners, and not partnership property.

Law Applied (Opinion delivered by Just. Sheldon of the Supreme Ct.): The parties having entered into an oral agreement to form a partnership before purchasing the land, the partnership was formed at that time, although the drawing up of articles to evidence the existence of the partnership was postponed to a future time. The purchase of the land and the commencement of the erection of the mill were steps taken by the partners in carrying out the terms of their oral contract of partnership.

It matters little whether the purchase of the property was made with a joint fund previously created by contributions from each partner of a proportional part, or whether each one separately paid his proportional part of the purchase price. This was essentially a purchase with partnership funds for partnership purposes. Although Bopp took the legal title to an undivided one-fourth of the plant, in the view of a court of equity he had no such actual interest in the property distinct from partnership purposes, but took it subject to the implied trust that it should be applied first to the payment of partnership debts if necessary, so that his widow was not entitled to dower until all of the partnership debts had been paid.

CASE No. 116.

HEARTT *v.* WALSH.

(1874) 75 Ill. 200.

Facts: This was an action by the firm of Walsh, Jewell & Company, co-partners, against Chauncey B. Heartt, Robert Heartt, and August Steinhouse, co-partners, to recover the value of grain sold. After the sale and delivery of the grain, Chauncey B. Heartt and Jewell made a final settlement of accounts, Heartt giving his personal note with the intention of binding his firm for the amount due, and Jewell, in the name of his firm, executing a receipt in full. At maturity the note was paid by Heartt out of partnership funds.

Argument of Defeated Party (Walsh, Jewell & Company): The settlement between Heartt and Jewell was not binding upon Walsh, Jewell & Company, for the reason that an understanding existed between the parties that payment should be made only upon surrender of duplicate bills which were issued whenever grain was delivered; and that the duplicate bills were not surrendered in the settlement.

Law Applied (Opinion delivered by Just. Sheldon of the Supreme Ct.): In the absence of agreement to the contrary, each partner has implied authority to collect partnership debts and to receipt therefor.

The arrangement calling for the surrender of duplicate bills was made after a disagreement between the parties had taken place as to the exact quantity of certain grain delivered; and the only object of having duplicate bills sent with each load of grain was to avoid future disputes as to the quantity and value of the grain delivered. In this case Jewell, who accepted the note for his firm, did not raise any question as to the quantity or value of the grain, so that the surrender of duplicate bills was an immaterial circumstance. The account sued on was settled with Jewell, the amount was subsequently paid by Heartt for his firm, and there can be no further recovery.

CASE No. 117.

BURGAN *v.* LYELL.

(1851) 2 Mich. 102; 55 Am. Dec. 53.

Facts: Lyell, Harvie and others were co-partners in the business of mining, under the name of the United States Mining Company. The articles of co-partnership expressly

provided that no single member of the firm was authorized to make a contract of employment for the firm. Harvie employed Burgan to work in the mines, and he labored for the company in their mining operations for about nine months. Prior to this time one of the members of the firm withdrew, but gave no notice of withdrawal. Burgan brought suit against the partners for the contract price of the labor which he performed.

Argument of Defeated Party (Lyell and others): As the articles of co-partnership expressly prohibited the employment of agents or servants by any single member of the firm, Harvie had no authority to enter into the contract of employment for the firm.

A member of a partnership who has sold out his interest therein is not liable for obligations accruing after the sale.

Law Applied (Opinion delivered by Just. Pratt of the Supreme Ct.): Harvie, being one of the partners, was vested with implied authority to contract with Burgan, and any work performed by him for the company under the contract was legally binding upon all of the members of the firm, although Harvie, as a single member, was prohibited from making such a contract by an express provision in the partnership agreement. The rights of third persons would not be affected thereby, unless such provision was known to them.

Each member of a partnership continues liable to third persons for any debt incurred in the transaction of their legitimate business until the dissolution of the partnership and notice thereof. A dissolution by the silent withdrawal of one member will not relieve that member from liability for work done before, or for debts contracted after such withdrawal without notice.

CASE No. 118.

FOX *v.* CURTIS.

(1896) 176 Pa. St. 52; 34 Atl. 952.

Facts: Fox and Curtis, co-partners, were wholesale shoe dealers. Curtis confessed two judgments, aggregating $9,500, in the firm name. Executions on the judgments were delivered to the sheriff, who, on the same day, sold the personal property of the firm under the execution for the sum of $4,600. On the following morning Curtis executed an assignment in writing of "all the unpaid book accounts and outstanding claims due" to the firm of Fox and Curtis, to the two creditors who had obtained judgments on the previous day. Shortly thereafter

Fox also made an assignment of the partnership book accounts, to Fiske, in trust for the creditors of the firm. Each assignee notified the debtors of the firm not to pay the other, and these notices effectually stopped the payment of all accounts. Fox filed a bill in chancery to restrain the assignee of Curtis from exercising any powers under his assignment, and for the appointment of a receiver, as the firm was insolvent.

Argument of Defeated Party (Curtis): Each partner has implied authority to make an assignment for the firm.

Law Applied (Opinion delivered by Just. Fell of the Supreme Ct.): While a contract of partnership constitutes each of its members an agent for the other, it is for the purpose of carrying on the partnership, and not for destroying it. Depriving the firm of all of its property by the act of one partner is not contemplated at the time of the formation of a partnership, and consequently no such agency exists. While it is true that assignments to creditors by one partner have been held valid, it is also true that such assignments are only justified when the other partner or partners have left the country or abandoned the business. If one partner has left the country, he must be considered as having given his co-partner implied authority to act in all matters for the firm, and under such circumstances the assignment, if fairly made and beneficial to the interests of the partnership, will be sustained. There are no exceptional circumstances in this case which justify the assignment, and therefore the assignment is void, having been made without actual or implied authority.

CASE No. 119.

LINDH *v.* CROWLEY.

(1883) 29 Kans. 542.

Facts: Crowley and Charles F. Freeman were co-partners doing business under the name of "Freeman & Company." Freeman, being the managing partner, borrowed some money from Lindh and executed three notes to his order, each note being signed "Freeman & Company." Lindh brought suit against Crowley as a partner, for recovery of the amounts due on the notes.

Argument of Defeated Party (Crowley): He never received any benefit from the consideration for the notes; nor did any portion of such consideration ever go into the partnership business, the loans having been personal loans to Freeman.

Law Applied (Opinion delivered by Just. Valentine of the Supreme Ct.): It does not make any difference whether the money was actually used in the partnership business or not; or whether Crowley ever received any benefit therefrom. If Lindh, acting in good faith, thought the money was to be used in the partnership business, that was sufficient. When a person in good faith loans money to a commercial partnership through the managing partner he is not obliged to see to the proper application of that money. The managing partner is the agent of the firm, and not of the lender. If the partner receiving the money misappropriates it, the partnership will suffer, and not the party who loans it.

It is urged that the money was loaned entirely on the credit of Freeman, and not upon the credit of the firm. Lindh loaned the money to go into the partnership business; he loaned it through the managing partner, and took partnership notes for the amount. These facts plainly indicate that he gave credit to the partnership as well as to Freeman.

Crowley, as a partner, is liable on the notes.

CASE No. 120.

METCALFE *v.* BRADSHAW.

(1893) 145 Ill. 124; 33 N. E. 1116; 36 Am. St. Rep. 478.

Facts: Metcalfe and Bradshaw formed a partnership for the practice of law, and co-partnership articles were prepared and signed. The fifth section of the articles of co-partnership provided as follows:

"We, and each of us, do promise and agree to give our time, our talents and our strength to the prosecution of the interest of the firm."

The co-partnership continued for eleven years, when it was dissolved by mutual consent. Before dissolution, Bradshaw had acted as executor in several estates, and had received commissions for such services. After dissolution, Metcalfe filed a bill in chancery for an accounting, alleging that, as a partner, he was entitled to a share of the commissions received by Bradshaw.

Argument of Defeated Party (Metcalfe): Good faith requires that a partner shall never obtain a private advantage over his co-partners. It is the duty of each co-partner to devote himself to the interests of the firm. No partner has a right to engage in any business which must necessarily deprive the

partnership of a portion of his skill, industry or talent, which he is bound to devote to the partnership.

Law Applied (Opinion delivered by Ch. Just. Bailey of the Supreme Ct.): The only question submitted for decision was whether the commissions earned by Bradshaw while acting as an executor or as an administrator were properly a part of the proceeds of the business. A partnership was organized "for the purpose of practicing law," and the acceptance of an appointment as executor or administrator does not necessarily pertain to the practice of law.

While it is true that a partner has no right, in the absence of an express agreement, to carry on a business in competition with his firm, the mere acceptance of an appointment as executor or as administrator can hardly be considered as competition with the firm. In this case there was no showing that the partnership business suffered from lack of attention caused by Bradshaw's activities as executor and administrator, nor were any of the trusts accepted by Bradshaw without the knowledge and consent of Metcalfe. Metcalfe is not entitled to a share of the commissions earned by Bradshaw.

CASE No. 121.

BROWNELL *v.* STEERE.

(1889) 128 Ill. 209.

Facts: Rugg, doing a boot and shoe business, failed, and his stock was sold to Brownell and Steere who, as partners under the name of W. J. Brownell & Company, continued the business at the old stand. McLean, who had been a clerk for Rugg, continued to act for the new partnership. Five years later the firm of W. J. Brownell & Company dissolved. After dissolution MeLean sued the partners for a balance due him for salary, and received a judgment. Brownell defended the suit, expending money for costs and attorney's fees. On the final accounting between the parties, these expenditures were charged to the firm. Brownell, who wound up the business of the firm, charged McLean's account to Steere, on the theory that McLean was a personal employee of Steere, and not an employee of the firm. In the accounting in court McLean's salary for the five years was charged to the firm, and Brownell was allowed the money which he expended in defending McLean's suit.

Argument of Defeated Party (Brownell): McLean was an employee of Steere, and not an employee of the firm. As

Steere's personal employee, he was not entitled to compensation from the firm, as a partner cannot have compensation for his services in and about the partnership business.

Steere assigned as cross-error that Brownell was not entitled to reimbursement for money expended in defending the McLean suit; and Brownell should have been charged with interest on the property and funds in his hands after the dissolution.

Law Applied (Opinion delivered by Just. Magruder of the Supreme Ct.): McLean was an employee of the firm and not exclusively of Steere; therefore McLean's salary was properly charged to the firm.

Expenditures made by Brownell in defending McLean's suit were for the benefit of the firm, were not excessive or unnecessary, and consequently were properly charged to the firm. In winding up the business of the firm after dissolution, Brownell closed the accounts with reasonable diligence, and did not make any improper use of partnership funds. In the absence of a showing of unreasonable delay in accounting, or of misappropriation of partnership funds, Brownell could not be charged with interest.

CASE No. 122.

HEATH *v.* WATERS.

(1879) 40 Mich. 457.

Facts: Elijah W. Waters and his brother Daniel were partners in the business of manufacturing and selling wooden ware, under a written agreement providing that each partner should have an equal right and interest in the business. For a part of one year Elijah, being confined to his house, was unable to take an active part in the business. He died later, and his widow was appointed administratrix of his estate. Daniel Waters, the survivor, represented to the widow that he was entitled to compensation for services rendered in managing the business during Elijah's illness, and she turned over to him a partnership claim, approximately valued at $3,100. At a later date, the administratrix brought an action for a partnership accounting in which she asked, among other things, that the assignment of the $3,100 claim to Daniel be set aside on the ground that Daniel was not entitled to compensation for services rendered to the partnership, in the absence of an express agreement to that effect.

Argument of Defeated Party (Daniel Waters): A surviving partner who carries on the business of the firm, and is required to account for profits to the decedent's estate, is entitled to compensation for services rendered.

Law Applied (Opinion delivered by Ch. Just. Campbell of the Supreme Ct.): The articles of co-partnership contained no provision for compensation for services rendered by one partner while the other partner is sick or disabled. The sickness or inability of a partner is one of the risks incidental to the business, and the mere fact that one partner is required to do a greater portion of the work will not entitle him to compensation for such additional work in the absence of an express agreement. Daniel was bound to use his best efforts and judgment at all times in promoting partnership enterprise, without further compensation than his share of the profits. The assignment of the $3,100 claim to Daniel operated as a fraud in law, whether fraudulent in fact or not, and Daniel should account for it.

CASE No. 123.

GRIGGS, *Admr., v.* CLARK.

(1863) 23 Cal. 427.

Facts: William T. Clark was in partnership with others in the purchase and sale of cattle. When the partnership was formed, the contributions of capital by the several partners were very unequal, Clark contributing practically nothing more than his skill and services. After his death, Griggs, the administrator of his estate, called upon the other partners for a settlement and accounting of the partnership property and profits. They expressed a willingness to settle and account, but not upon the basis claimed by the administrator, namely, that the profits should be divided equally, regardless of the proportion of contribution. Upon refusal of the surviving partners to settle upon that basis, the administrator brought an action for an accounting.

Argument of Defeated Party (Clark and others, defendants): Each party is entitled to an interest in the partnership property, and in the profits in proportion to the amount of capital contributed, and not in equal proportion.

Law Applied (Opinion delivered by Just. Baldwin of the Supreme Ct.): In the absence of a special agreement between the partners upon the question of division of profits and losses,

the partners share equally regardless of the fact that they have contributed unequally to the capital, or that one has put in all of the capital, and the others only their skill and services.

CASE No. 124.

HILL *v.* BEACH.

(1858) 12 N. J. Eq. (1 Beasley) 31.

Facts: Hill entered into a contract with Pendleton, Rouse, Horace Andrews and Charles S. Andrews under the terms of which all of the parties agreed to contribute equally toward the purchase of a stone quarry for the sum of $27,000. After the payment of $14,500 on account of the purchase price, a deed was given to Horace Andrews, one of the partners, and a mortgage was given back to the seller for the balance. There being a default in the payment of the balance, the mortgage was foreclosed and the property sold by order of court. After payment to the mortgagee out of the proceeds of the judicial sale, of the amount due him, there remained a surplus of $3,880.20. Hill brought an action asking for the distribution of the surplus, claiming that he was entitled to his proportionate share thereof, together with the sum of $1,500 for advances he had made to the partnership. He further claimed that Horace Andrews was indebted to him in a large sum of money, which should be deducted from Horace Andrews' share of the surplus, and paid to him. All of the partners were made defendants, together with Stephens, Condit and Company, who were creditors of the partnership, Beach, who claimed that he had an assignment of the interest of Horace Andrews and Charles Andrews, and Backus and Bliss, attaching creditors of Horace Andrews.

Argument of Defeated Parties (Backus and Bliss): Advances made by Hill to the partnership should not be repaid until after payment of the claims of all creditors, including the individual creditors of a partner.

Argument of Complainant Hill: Inasmuch as he had made a personal advance to the defendant Andrews, and the money so advanced was appropriated to partnership uses and purposes, he is entitled to an equitable lien on the interest of his co-partner Andrews, which lien is superior to the lien of other individual creditors of Andrews.

Law Applied (Opinion delivered by Chancellor Williamson): The funds remaining after the payment of the mortgage should be distributed as follows: Stevens, Condit &

Company, creditors of the partnership, should first be paid; after payment of all partnership debts, the equities between the partners should be settled before the payment of any debts to individual creditors of the partners. Hill should be remunerated out of the partnership funds, for the $1,500 which he advanced to the firm; but as to the loan to Andrews, he is not entitled to any priority.

CASE No. 125.

RAINEY *v.* NANCE.

(1870) 54 Ill. 29.

Facts: The Nance brothers, owners of two lots, were engaged in erecting a steam flouring mill thereon. Rainey made an agreement with the Nances, binding himself to pay the sum of $5,666.66 toward the completion of the mill and for the purchase of necessary machinery, and the Nances agreed in return to convey to Rainey an undivided third of the lots and mill, free from incumbrances, together with other property. The Nances completed the mill, and executed a deed to Rainey for a third of the property, and the parties then formed a co-partnership, which they called Nance Brothers & Company, and commenced the milling business. Rainey paid the purchase money to the Nances, who used it in separate ventures, and not in the business of the firm. After the formation of the partnership, the firm borrowed $1,547.81 from Brahm & Green, and the firm executed a mortgage to Brahm & Green for that amount. At the time Rainey purchased his interest in the partnership, there were some mechanics' liens on the property, which fact was unknown to him. The Nances were also indebted to one Cushman and many others, and on one occasion they executed a mortgage on their interest in the partnership property, to several of their creditors. After several of the individual creditors of the Nances had taken steps to enforce their claims against the partnership property, Rainey applied for an injunction to restrain the sale of the property and asked that the partnership property be applied to pay the partnership indebtedness; that the partnership be dissolved; and that the money advanced by him to become a member of the firm be refunded after the payment of the partnership debts.

Argument of Defeated Party (Cushman and others): A separate creditor of one member of a partnership may acquire

a specific lien on the interest of such partner to firm property, which is superior to the rights of partnership creditors who have not acquired such a lien, and to the rights of other partners in the partnership funds.

Law Applied (Opinion delivered by Just. Walker of the Supreme Ct.): In the distribution of the proceeds of a sale of the partnership property, the specific liens against the property should first be paid. After the payment of the specific liens, general creditors of the firm should then be paid. If there are no advances or loans by the partners to the firm, the fund remaining should be divided in the proportion of the contributions of capital. In this case the mechanics' liens were properly paid first out of the partnership funds, as it was a partnership debt and became a prior specific lien on the partnership property. The mortgage of Brahm & Green was the next specific lien in order, and it should next be paid. After the payment of the liens mentioned, the general creditors of the firm should be paid. The specific liens of the creditors of the Nances are inferior to the claim of Rainey, as the creditors of a partner acquire only the interest of the debtor subject to the settlement of partnership debts and liabilities, and the payment of Rainey's share is, or can be considered, as to Nances' individual creditors, a partnership debt. After the payment of partnership debts to third persons, Rainey was entitled to receive out of the sum remaining, his share, and in addition he is entitled to be reimbursed for that portion of his interest in the mill property which was appropriated to the payment of the mechanics' liens. Rainey, to the extent of his third interest in the partnership property, should be considered a creditor of the firm, whose claim is inferior to those of all the other partnership creditors, but superior to the individual creditors of the Nances.

CASE No. 126.

MASON, *Assignee, v.* TIFFANY, *Adm'x.*

(1867) 45 Ill. 392.

Facts: Mason, as assignee of Mason, McArthur & Company, filed a bill in chancery against Catherine E. Tiffany, administratrix of the estate of George B. Tiffany, deceased, to compel the payment by the estate of a claim held by Mason against the firm of Tiffany & Company, co-partners. George B. Tiffany, of the firm of Tiffany & Com-

pany, made a contract with Mason, McArthur & Company, for the manufacture of boilers; but before delivery of the boilers Tiffany died. The boilers were delivered to the surviving members of the partnership, who continued the business in the old name, and they executed notes in the name of the firm, for the purchase price of the boilers. Later the surviving partners of Tiffany & Company purchased Tiffany's interest in the concern, and shortly thereafter made a general assignment for the benefit of their creditors. It appears that the suit was not started until some time after the surviving partners of Tiffany & Company had made their assignment.

Argument of Defeated Party (Tiffany): The boilers were not delivered until after the death of Tiffany, and the surviving partners made a new contract when they executed their notes for the purchase price, in the name of Tiffany & Company, they continuing the business under that name. The firm of Tiffany & Company was not insolvent at the time of Tiffany's death, and if the complainants had exercised due diligence in the collection of the notes, they would have been collected of the surviving partners prior to the assignment for the benefit of creditors.

Law Applied (Opinion delivered by Ch. Just. Breese of the Supreme Ct.): Inasmuch as a partnership debt is joint and several, it follows that resort may be had in the first instance to the assets of the deceased partner, without having instituted suit against the surviving partners. The boilers in question were ordered by the firm of Tiffany & Company, the construction was superintended to some extent by Tiffany himself, and they were delivered to and accepted by the surviving partners, and the notes in question were executed in the firm name. The boilers were made, delivered and accepted, substantially under the contract made by Tiffany for the firm. This was an indebtedness existing against the firm of George A. Tiffany & Company during the lifetime of Tiffany, and such indebtedness existed before the dissolution of the firm by Tiffany's death. Inasmuch as this was a partnership debt, which, in Illinois is joint and several, the complainant had the right to start suit in the first instance against the estate of the deceased partner.

The fact that the surviving partners remained solvent for a long time after the death of Tiffany in no way affects the rights of the complainant as long as suit was instituted within the time prescribed by the statute of limitations.

CASE No. 127.

MOIST'S ADMINISTRATORS' APPEAL.

(1873) 74 Pa. St. 166.

Facts: The three Moist brothers had been partners in farming for a number of years. Runk, their nephew, came to them, and he lived and worked for them seventeen years, when Moses Moist, one of the partners, died. The surviving partners admitted that the firm owed Runk $1,400 for wages, and they paid him that amount. The administrators of the estate of Moses Moist paid the surviving partners $400 as the decedent's share of the indebtedness. The trial court refused to allow the payment by the administrators, and the administrators appealed to the Supreme Court.

Argument of Defeated Party (Trial Court): There was no contract with Runk for services; and, in the absence of a contract, he could not recover from the estate. The acts of the surviving partners were beyond the scope of their authority, as such.

Law Applied (Opinion delivered by Just. Williams of the Supreme Ct.): The administrators were justified in allowing the surviving partners credit for the payment of Runk's account, as he performed the services, and the obligation is a partnership obligation. It is admitted that there was no fraud or collusion, and the settlement was made in good faith. It was the duty of the surviving partners to make the settlement; and, as it was honestly and fairly made, and as the surviving partners were forced to pay the obligation out of their individual assets, they are entitled to compensation from the deceased partner's estate for that partner's share of the indebtedness.

CASE No. 128.

GILLILAN *v.* THE SUN MUTUAL INSURANCE CO.

(1861) 41 N. Y. 376.

Facts: Gillilan was a part owner of the ship *Jamestown* prior to and down to the time of her loss at sea. Slate and Lyles, co-partners trading under the name of Slate & Company, were likewise part owners, and also agents of the other owners, authorized to make insurance on the ship's freight, to receive her earnings, and to make any necessary disbursements and

contracts concerning the ship or her cargo. They took out a policy of insurance in The Sun Mutual Insurance Co. on the ship's freight, against loss at sea. The policy was made to "Slate & Company, on account of whom it may concern, loss payable to them." Later, Slate & Company became insolvent, at which time they were indebted to the ship owners for various sums held as agents. Slate and Lyle were co-partners of Gillilan and others. After the ship had been lost at sea, Gillilan served a notice in writing upon the Insurance Company that the policy was for the benefit of the owners; that he was one of the owners; that, in consequence of the insolvency of Slate & Company, the payments of the insurance money should be made to the other owners of the ship; and that he would take measures within a short time to enforce his claim to the proceeds of the insurance policy. The Insurance Company had already paid Slate & Company a portion of the insurance money, and continued to make subsequent payments to Slate & Company, disregarding the notice by Gillilan. Gillilan then brought suit against the Insurance Company for the recovery of the payments made by the company after the receipt of notice from him.

Argument of Defeated Party (Gillilan): The insurance, although made in the name of Slate & Company, "was for the benefit of and in trust for all the joint owners and the co-partnership fund"; "by the loss of the ship, the partnership became of necessity dissolved," and the payments made after receipt of the notice of December 24, 1859, were unauthorized and fraudulent.

Law Applied (Opinion delivered by Just. Lott of the Supreme Ct.): It is a well established rule of law that, after the dissolution of a partnership, any member of the firm may receive a debt due to it and give a valid receipt of release therefor. The notice of Gillilan to the Insurance Company merely operated as a notice of dissolution; and dissolution of a firm does not of itself deprive a partner of authority to collect debts due to the firm and to give receipts therefor. The mere inability of an insolvent member of a partnership to pay his individual obligations does not in any way affect his power or authority as a partner; therefore the judgment against the Insurance Company was unwarranted.

CASE No. 129.

BOOKER *v.* KIRKPATRICK.

(1875) 67 Va. (26 Gratt.) 145.

Facts: Booker and Halsey were co-partners engaged in the manufacture of tobacco. All of the business of the firm was conducted in Missouri by Halsey, who was a resident of that state. Booker was a resident of Virginia. Booker & Halsey hired slaves owned by Kirkpatrick, to be employed in their business, the hiring to commence on March 15, 1861, and to continue for the balance of the year. At the time of the hiring, Halsey executed three notes in the name of the firm, payable to the order of Kirkpatrick, aggregating $1,310. On April 17, 1861, the Civil War was declared. Missouri was one of the Northern States, and Virginia was one of the Southern States. After the war was over, Kirkpatrick started suit against Booker and Halsey on the notes.

Argument of Defeated Parties (Booker and Halsey): The declaration of war between the North and the South dissolved the partnership between Halsey and Booker, and relieved the partners from their antecedent obligations.

Law Applied (Opinion delivered by Just. Christian of the Supreme Ct.): While the Civil War dissolved the partnership between Booker and Halsey, it did not relieve either of the partners from obligations existing at the time of the declaration of war. A dissolution of the partnership has respect only to the future, the parties remaining bound for all pre-existing indebtedness. The partners are jointly and severally bound according to the terms of their contract with Kirkpatrick.

CASE No. 130.

ACH *v.* BARNES.

(1899) 107 Ky. 219; 53 S. W. 293; 21 Ky. L. Rep. 893.

Facts: M. L. Barnes, a widow, and Nina Barnes, her daughter, were co-partners in a millinery business, which continued until shortly before the marriage of the mother, when the mother gave to her daughter all of her interest in the business. By agreement, the partnership was at that time dissolved, but the business was continued in the firm name by the daughter. No publication of a notice of dissolution was given. A few days after the dissolution, Myers, a traveling salesman for Ach, called at the store for the purpose of making sales, and Miss

Barnes informed him of her mother's marriage and of the dissolution of the partnership. Myers sold goods to her with full knowledge of all the facts. Ach attempted to hold the mother as a co-partner.

Argument of Defeated Party (Ach): After dissolution of the partnership each member of the firm became liable for the acts of any partner within the scope of the firm business, unless due notice of dissolution has been given. Notice to a sales-agent is not sufficient.

Law Applied (Opinion delivered by Just. Burnam of the Supreme Ct.): When an ostensible partner retires from the firm, he must give due notice of his retirement to those who have had dealings with the firm, in order to avoid responsibility for future debts, or he must show actual knowledge on their part, or adequate means of knowledge, that the firm has been dissolved. Myers, who was engaged by authority of Ach, received actual notice of the fact of dissolution, and it was his duty, as the agent of the plaintiff, to communicate that fact to his principal. In this case notice to the agent must be considered notice to the principal; and inasmuch as Ach, through his agent, had actual notice of the dissolution, Mrs. Barnes, a retiring partner, was not liable.

CASE No. 131.

COLMESNIL *v.* HONORE.

(1829) 1 J. J. Marsh. 506; 24 Ky. 347.

Facts: Colmesnil and Honore formed a partnership as grocery and commission merchants. Their agreement was not reduced to writing, and the evidence as to terms of the contract of partnership was very conflicting. Colmesnil filed a bill for an accounting, and asked that the rights of the partners be determined.

Argument of Defeated Party (Honore): Each partner was to contribute to the firm all his money and capital, and the profits and losses were to be divided in proportion to the capital advanced.

Argument of Colmesnil: The contract of partnership provided that each partner was to contribute an equal amount to the capital. No specific sum was ever agreed upon, and the profits and losses of the business were to be shared equally.

Law Applied (Opinion delivered by Just. Underwood of the Supreme Ct.): Had there been an express contract in

writing, providing for the existence of the partnership and defining the rights, duties and liabilities of the partners, no difficulty would have arisen. In the absence of such a contract, and in the absence of proof showing an express agreement, the losses as well as the profits must be divided equally.

CASE No. 132.

WIPPERMAN *v.* STACY.

(1891) 80 Wis. 345; 50 N. W. 336.

Facts: Green and Stacy entered into a contract, under the terms of which Green was to put in his time and labor, and Stacy was to furnish $2,000 in money or credit, for the purpose of carrying on a retail merchandise business, and they agreed to share the profits of the business equally. Green was to purchase all goods used in the store. No provision was made for division of losses. Green purchased some goods of Wipperman for the price of which Wipperman sued Stacy and Green as co-partners.

Argument of Defeated Party (Stacy): The agreement between Stacy and Green did not constitute a co-partnership, and therefore Stacy cannot be held as a partner.

Law Applied (Opinion delivered by Just. Orton of the Supreme Ct.): The arrangement between Stacy and Green appears to have every essential element of a partnership. Stacy agreed to contribute his money, and Green agreed to contribute his skill and labor as a merchant, to conduct the business and to make all purchases for the firm; and there was an agreement for an equal division of the profits. Although the contract does not provide that each partner must bear one-half of the losses, the equal division of the profits implies an equal division of the losses.

CASE No. 133.

BOHRER *v.* DRAKE.

(1885) 33 Minn. 408; 23 N. W. 840.

Facts: Bohrer entered into a contract with Drake for the purchase of eggs, and for the storage and sale of the same, on their joint account. Drake had a cold storage warehouse. They were to receive the eggs, keep them in storage in a cold room of proper temperature, until they were disposed of. Either party had the right to make sales. No compensation was allowed to either party, and the profits and losses were to be divided

equally between them. The parties agreed to contribute equally, and the funds necessary for the business were to be obtained by the execution of notes calling for the payment of equal amounts by each party, the notes to be endorsed by the other party. An agreed quantity of eggs was purchased and placed in storage; but, owing to improper refrigerating, a large quantity of the eggs became spoiled, and losses resulted. In the subsequent adjustment of the ensuing financial difficulties, Bohrer was obliged to pay all of his own notes and $500 on Drake's notes. Suit was brought by Bohrer for reimbursement for the amount paid on Drake's notes.

Argument of Defeated Party (Drake): The facts as presented did not state a cause of action against the defendant.

Law Applied (Opinion delivered by Just. Dickinson of the Supreme Ct.): The legal effect of the contract entered into by the parties was to create a partnership which was dissolved by the completion of the business for which it was created. If one member of a partnership is forced to pay partnership liabilities out of his own personal funds, where there are no partnership assets, he has a right to enforce contribution from his co-partners. Bohrer is entitled to be reimbursed for the payment on Drake's notes upon which Drake's share of the partnership funds was raised.

CASE No. 134.

WHITCOMB *v.* CONVERSE.

(1875) 119 Mass. 38; 20 Am. Rep. 311.

Facts: Whitcomb entered into a partnership with Converse, Stanton and Blagdan for the purpose of transacting a dry-goods commission business. The articles of co-partnership provided that Converse should contribute the sum of $25,000, upon which he was to receive interest at 7%; and should devote such time and attention to the business as he might be able to give; that Whitcomb should contribute $50,000, upon which he was to receive 7% interest, and should give all his time to the business; that Blagdan and Stanton should contribute all of their time to the business; and that each partner should receive 25% of the net profits. No provision was made for losses or for a division thereof. The partnership was dissolved by agreement and Whitcomb was authorized to settle the affairs of the firm. On the accounting it appeared that losses amounting to about $25,000 had resulted, and the question arose

as to whether the loss in question was a partnership loss or an individual one. Blagdan was insolvent and unable to pay any part of the loss. Whitcomb instituted a suit against the other partners to compel contribution to the losses incurred by the partnership.

Argument of Defeated Parties (Stanton and Converse): Whitcomb cannot recover from his former co-partners for a loss of capital contributed by him. He contributed money and the others contributed their talent, energy and business ability. The contribution of money was for the purpose of procuring the aid of such talent, energy and skill contributed by the others, and the contributions of the others were made for the purpose of obtaining the benefit and advantage of the cash contributions.

If there is any liability at all, there is none to make good any part of what another partner cannot pay.

Law Applied (Opinion delivered by Ch. Just. Gray of the Supreme Ct.): In the absence of a special agreement, partners must bear losses in the same proportion as the profits of a business, even if one contributes all of the capital and the other nothing but his labor or services. Whether a loss of capital is a partnership loss depends upon the nature and character of the partnership contract.

If one member of a partnership contributes the mere use of capital, and the partnership is in profits and losses only, the title to the property contributed by a partner remains in the partnership, and any loss or destruction of the property contributed falls upon that partner as owner.

In an ordinary trading partnership, the relation created is not merely in the profits and losses, but in the property also, and the title to the property is transferred from the contributing partner to the firm, becoming the joint property of the partners. In such a case, the re-payment of contributed capital constitutes a partnership obligation to the contributing partners; and if the assets of the firm upon dissolution are not sufficient to satisfy this obligation, all the partners must bear it in the same proportion as other debts of the firm. In this case the contributing partners did not contribute merely the use of the capital, but the capital itself; and under the terms of the partnership agreement, they were to receive interest on the contributions, at an agreed rate. By that agreement, the partners were to receive each one-fourth of the net profits, and the law implies, in the absence of an agreement to the contrary, that the losses will be shared in the same proportion.

Blagden being insolvent and unable to discharge any portion of his obligation, it rests in equity with the three solvent partners to pay the partnership obligations, including re-payment of capital, each solvent partner to contribute one-third of the total losses.

CASE No. 135.

MATTHEWS *v.* ADAMS.

(1896) 84 Md. 143; 35 Atl. 60.

Facts: Matthews and Adams were partners in the publication of a newspaper. There were no written articles of co-partnership. The property and business were purchased by Matthews and Adams for $7,025; and at that time each partner contributed the sum of $1,512.50 in cash, giving back a mortgage for the balance of the purchase price. It was agreed that the profits and the losses of the business were to be shared equally. The business was conducted for a number of years, during which Adams advanced $1,191.74 to the firm, beyond his share of capital. The plant, good-will and establishment of the paper having been sold, Matthews brought an action for a dissolution of the partnership and for an accounting. One of the main questions involved in the accounting was the allowance of interest on the advance made by Adams.

Argument of Defeated Party (Matthews): In the absence of a special agreement therefor, no interest should be allowed on advances made by one partner to the firm.

Law Applied (Opinion delivered by Just. Briscoe of the Supreme Ct.): While it may be true that a partner is not in every case entitled to interest on advances made by him to the firm, there are many cases where the facts and circumstances justify an allowance of interest. In this case the proof is clear that the money advanced by Mr. Adams was paid at a time when it was absolutely necessary to raise that amount in order to preserve the property and carry on the business. Advances or loans to a partnership by one member thereof are not like capital, but like borrowing from third persons; and where prompt payment of firm debts is necessary, and one partner advances the required amount, in equity he should be allowed interest thereon.

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